TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

No. 167

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED NOVEMBER 24, 1900.

(19,170.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 519.

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

DARDEN (Pilot)
vs.
THOMPSON, Master of the Schooner "Wm. Neely."

To the honorable judges of the supreme court of appeals of Virginia:

The petitioner, Joseph J. Darden, (pilot,) respectfully represents that he is aggrieved by a final judgment of the court of law and chancery, of Norfolk, Virginia, entered on the 12th day of February, 1903, entering up judgment for the defendant upon his demurrer to the petitioner's declaration against the said defendant.

The transcript of the record in the case in which said judgment was entered is herewith filed, from which it will appear that the said case was as follows:

At the rules held at the clerk's office in said court on the first Monday in September, 1902, the plaintiff filed his declaration against the defendant for the recovery of pilotage charges:

That thereafter, on the 1st day of October, 1902, the defendant filed his demurrer to the said declaration and each count thereof, and his plea of non assumpsit, and the plaintiff joined in the said demurrer and replied generally to the said plea:

That afterwards, on the 11th day of October, 1902, the
2 court sustained the defendant's demurrer to the said declaration, and gave leave to the plaintiff to file an amended declaration:

That afterwards, on the 17th day of November, 1902, the plaintiff filed his amended declaration, in the words and figures in the transcript of the record set out, and the defendant filed his demurrer with the grounds thereof, to the said amended declaration, in the words and figures as set out in the said transcript of the said record; and the plaintiff joined in the said demurrer and replied generally to said plea;

That thereafter, on the 31st day — January, 1903, the court sustained the defendant's demurrer to the plaintiff's said amended declaration, and subsequently, on the 12th day of February, 1903, gave judgment for the defendant upon the said demurrer, to which ruling and judgment of the court sustaining said demurrer and entering judgment for the defendant, plaintiff excepted.

From an examination of the amended declaration in this case, which consists only of a single count, it will appear that this is a suit by the plaintiff, as one of the licensed pilots of the State of Virginia, against the defendant as master of schooner "Wm. Neely" to recover pilotage fees, amounting to the sum of $87.75, alleged to be due to the plaintiff by the defendant by reason of the plaintiff's

offer of his services as pilot to the said defendant, and the refusal of the said defendant to accept the same.

It will also appear from an examination of the transcript of the record that the defendant demurred to the said declaration, and for reasons therefor, stated seven grounds; that the second of the said grounds of the demurrer to the said declaration is that the statutes of the State of Virginia under which the said action was brought are in conflict with section 4237 of the U. S. Revised Statutes, which section provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage, or half pilotage, between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

Upon the said demurrer — rendered the following opinion,
3 which is here recited as a part of this petition:

Opinion of Judge W. B. Martin.

"These cases were heard on demurrer to the special counts in the respective declarations. The same question is involved, in both of these suits, to-wit: the validity of section 1965 and other sections of the Code of Virginia imposing pilotate fees upon certain vessels therein mentioned.

"Under the pilot laws, which are contained in chap. 89 of the Code of Virginia, pilotage fees are imposed upon all vessels inward bound from sea (except coasting vessels having a pilot's license) and going to Smith's point, Yorktown, Newport News or Norfolk, or any intermediate point, and likewise on all vessels outward bound to sea from said points. But vessels bound to any point on the Potomac river are excepted. The effect of the law is that no vessel sailing between any port in Virginia is liable to pilotage fees, while all vessels sailing between the points above named in Virginia and ports in other States which are reached by sea by way of the waters between the capes of Virginia, are liable to such fees. Section 4237 of the Revised Statutes of the United States provides that:

"'No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage, or half pilotage, between vessels sailing between the ports of one State and vessels sailing between the ports of different States * * * and all existing regulations or provisions making any such discrimination are annulled and abrogated.'

"I am of the opinion that section 1965 of the Code and the other provisions of the pilot law fixing pilotage fees in cases such as are mentioned in the declaration in the cases at the bar, are in conflict

with sections 4237 of the Revised Statutes of the United States, because they make discriminations as to pilotage between vessels sailing between ports of Virginia, requiring no pilotage fees as to such vessels/ and vessels sailing between Virginia ports and the ports of other States lying outside of the capes of Virginia, which are required to pay pilotage.

Undaunted, 37 Fed. 662.

Spraigue *vs.* Thompson, 118 U. S., 90.

"For this reason the demurrer to the special counts in the declaration should be sustained."

4 From this opinion it will appear that the court, without passing upon the other grounds of the demurrer, decided that the statutes of Virginia, under which this action was brought, were in conflict with section 4237 of the Revised Statutes of the United States, above set up.

Your petitioner will, therefore, first discuss the question, whether the said statutes, which are contained in chapter 89 of the Code of Virginia, edition of 1887, are in conflict with section 4237 of the Revised Statutes of the United States, and will then, briefly discuss the other grounds taken in said demurrer.

It is admitted that the acts of Congress are paramount in matters pertaining to pilots and pilotage, and the question is thus squarely presented, whether the Virginia statutes on that subject are in contravention to section 4237 of the Revised Statutes of the United States. As far back as 1789 Congress enacted: "That all pilots in the bays, inlets, rivers, harbors and ports of United States shall continue to be regulated in conformity with the existing laws of States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose until further legislative provisions shall be made by Congress."

Act of 1789, chapter IX (I. U. S. Statutes at Large 53, section 4).

This act has been held to contain "a clear and authoritative declaration by the First Congress," that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national, that it is likely to be best provided for, not by one system, or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

Cooley *vs.* Board of Wardens of the Port of Philadelphia, 12 How., 318.

Under this contemporary construction of the Constitution, practically all of the sea coast States have, from time to time, passed acts regulating pilots and pilotage in connection with their own ports, and their constitutional right to do so has never been denied, except

when their enactments were in contravention to some act of Congress upon the same subject

That Congress has the paramount power to regulate pilotage is deducible from the constitutional grant to Congress of "power to regulate commerce with foreign nations and among the several States," and that it should have this power, is reasonable in view of the ever present possibility of conflicts between the laws of neighboring States upon this subject "deeply affecting that equality of commercial rights and that freedom from State interference which those who formed the Constitution were so anxious to secure."

(Cooley *vs.* Port Wardens, *ubi supra.*)

This apprehension on the part of the founders of our Government was in due course, realized by conflicts which arose as to pilotage rights under the laws of States of New York and New Jersey, which gave rise to the act of Congress of March 2nd 1837 to the effect that the master of a vessel bound to or from a port situate upon waters which are the boundery between two States, might employ a pilot licensed by either State

Jos. S. Rowland *vs.* The "South Cambria." (Dis. Cr. U. S. for district of Delaware.)

This act of 1873, and the act of 1866 now under discussion are believed to be the only acts of Congress (except those relating to vessels propelled by steam) of a general nature which have been passed on this subject of pilotage

The exact causes which led to the passage of the act of 1866 (Rev. Statutes sec. 4237) are not as apparent as in the case of the act of 1837, relating to waters which are the boundaries between neighboring States, but, it is submitted that a careful consideration of the conditions (geographical and local to the particular States) will point us as clearly to the purpose of the act of 1866 (Rev. Statutes, 4237) as if we could point out some specific cause for its enactment.

Let us remember at the outset, and carry with us throughout this discussion, that section 4237 of the Rev. Statutes in *terms* relates to discrimination between *vessels* piloting between certain ports, and against *vessels* propelled wholly or in part by steam and national *vessels.* Already, before the passage of the act of 1866, the Constitution itself, by a self acting provision had provided against discriminations, by State laws between *ports.*

The 6th clause of section 15, of art. I, of the Constitution provides that

"No preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another etc."

Thus prohibiting by constitutional provision the passage of any law by Congress, or by the several States, giving a preference to the *ports* of one State over those of another State. This constitutional prohibition of laws giving preference to the *ports* of one State over those of another, needed no assistance from congressional action.

It was the fundamental law of the land. And any law, State or Federal, contravening its provisions would, upon proof of that effect, be declared by the courts to be unconstitutional and *and* invalid.

No State law, therefore, could successfully attempt to discriminate in favor of the *ports* of its own State as such under the guise of pilotage laws, or regulations. There was, then, no call for any act of Congress prohibiting the passage of laws giving preference to the *ports* of one State over those of another.

The imposition of pilotage charges for entering or leaving a port does not constitute a preference to, but rather a burden upon, the particular port; and the failure to impose similar pilotage charges upon vessels entering and leaving other ports of the same State had been held not to constitute giving the prohibited preference to such other ports; tho' it might result in a certain inequality between the *ports* of the same State.

This seems clearly the result of the decision in Cooley *vs.* Port Wardens, etc., (*ubi supra*), where the statute construed imposed pilotage charges upon vessels entering and leaving the port of Philadelphia and expressly exempted from such charges vessels entering and leaving the ports "within the River Delaware." The court, holding that this law was not in conflict with the constitutional provision above quoted.

If, as was suggested by counsel for the plaintiff in the argument below, it was the decision of this case in 1851 which led to the passage of the act of 1866 (Rev. Statutes 4237) it would have been easy enough for Congress to have enacted that no State should pass any law imposing pilotage charges upon vessels entering and leaving one of its ports, without imposing similar charges upon vessels entering and leaving the other ports of such State. But Congress did not do so, and we contend that it is fair to assume that Congress realized, as the framers of the Constitution had, that the subject of pilotage is largely local, and is likely to be best provided for, "not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits" (Cooley *vs.* Port Wardens *ubi supra*); and that the legislature of a particular State was the best judge as to whether the geographical situation, the local conditions, the depth of water, sinuosity of channel, existence of bars, or other peculiarities of a particular port rendered it necessary to the safety of vessels entering such port that they should take pilots, and pay the stipulated charges, while the absence of similar local conditions made it unnecessary to impose similar pilotage charges
7 upon vessels entering and leaving other ports in the same State. As has been said, pilotage laws, if not made necessary by local conditions, are rather a burden than an advantage to a port; and the history of compulsory pilotage throughout the world will show that it has been adopted by commercial nations as the choice of the lesser evil, as compared with frequent salvage; and

the question whether the local conditions of one port require their imposition, while those of another port in the same State do not, would seem to be best left to the discretion of the legislature of the particular State.

We contend, therefore, that the act of 1866 (Rev. Statutes) was not passed because of, not intended to reverse, the decision of Cooley *vs.* Port Wardens, etc., and that, under that decision, the exemption of vessels going to certain ports in a State from the pilotage imposed upon vessels going to certain other ports in the same State does not constitute such a preference to the exempted ports as is prohibited by the Constitution of the United States, or by the act of 1866 (4237 Rev. Statutes).

It is at least worthy of note that this has been the universal construction of the law on this subject followed by the legislatures of the various States in framing their pilotage laws. In every case the States have exempted certain ports, either expressly or by failure to impose pilotage, from these charges while imposing them upon certain other enumerated ports.

New York, for instance, imposes pilotage upon vessels entering the port of New York by way of Sandy Hook, but not upon vessels entering the ports on the Hudson river.

Pennsylvania, upon vessels entering the port of Philadelphia but expressly exempts ports "within the River Delaware." Other States make similar express or implied exemptions.

The act of 1866 (4237 Rev. Statutes) was passed nearly 40 years ago, and all these State pilotage laws have been enacted, or amended since that time, and never until now does it seem to have been considered that the act of 1866 required the imposition of pilotage charges as to all of the ports of the State, alike.

Equality of commercial rights between the States, and freedom from State interference therein, was the fundamental idea of the constitutional provisions on this subject. The framers of the Constitution saw that this equality might be destroyed by acts of Congress, or State laws; giving "preference to the ports of one State over those of another State" and provided against this by *constitutional* enactment. When therefore, the Congress of 1866 met, it found that this equality of commercial rights between the States had been secured by the Constitution so far as the giving a "preference to the port of one State over those of another State" would disturb such equality of commercial relations. It found also,
8 if it considered it at all, that it had been held (Cooley *vs.* Wardens, *ubi supra*) that the imposition by State law of pilotage charges as to one of the ports of the State and not as to other ports of the same State, did not violate this constitutional provision. Such a law might bring about a certain inequality between the ports of the same State, but did not give a preference to the ports of such State over those of any other State.

It was still possible, however, that "that equality of commercial rights, and that freedom from State interference, which those who

formed the Constitution were so anxious to secure," might be affected by the passage *of* State legislatures of pilotage laws, or regulations imposing burdens upon *vessels* of a certain character trading to their ports, not imposed upon all *vessels* alike. Such statutes might be so framed as to operate in imposing burdens upon *vessels* trading between foreign ports, or the ports of other States and the ports of the particular State, not imposed upon *vessels* plying between the ports of such State. These laws would result in a disturbance of that "commercial equality" between the States so much desired, and in that "State interference" so much feared by the framers of our Constitution. But this result would be reached, however, by discriminations against *vessels* engaged in certain voyages, and not by giving any preference to the State *ports*, as such.

Such pilotage laws might be made to operate to the benefit of the commerce of one State, and to the injury of the commerce of other States. While, therefore, it was apparent that a certain inequality, in respect to pilotage laws, between the ports of the same State might be necessary, yet it was equally apparent that States should be forced to treat all *vessels, performing the same voyage*, alike. And this we think was the purpose, and should be the construction, of the act of 1866 (4237 Rev. Statutes).

It was passed evidently as another step in preserving equality of commercial rights between the States. It seeks to do this by prohibiting *discrimination*, in the matter of pilotage charges, between certain *vessels*. Now, it is submitted, that there can be no such thing as a discrimination between two parties unless it be in respect to the same act, or the attempted exercise of the same right, because, otherwise, there is no standard of comparison to determine whether there is a discrimination. If one person is *permitted* to do one act, and another person is *forbidden* to do *another, and entirely different, act*, there cannot be said to be a *discrimination* made between the two persons. You must put them in the same position and then deal differently with them in relation to that position, before there can be a discrimination between them. Therefore, we say, that when the act of 1866 prohibits discrimination between certain *ves-*
9 *sels* in respect to pilotage charges, it must mean between those *vessels* in the same situation—*i. e.*, making the same voyage.

To accomplish this end, it seems to us, Congress undertook in this act of 1866 to classify vessels and not ports, in providing for this equality of treatment by the State laws. Pursuing this idea the act makes four classifications:

(*a.*) Vessels plying between the ports of one State are dealt with as a class;

(*b.*) Vessels plying between the ports of one State and the ports of another State, constitute another class;

(*c.*) Vessels propelled in whole or in part by steam, constitute a third class;

(*d.*) National vessels constitute a fourth class.

Between these various classes of *vessels*, the act provides that there shall be no discrimination in the rates of pilotage, or half pilotage. But it is inconceivable that Congress should have intended to make the rates of pilotage the same in all cases, irrespective of the distance, duration or difficulty of the services performed by the pilot—as for instance, to impose the same rate of pilotage upon vessels going from Norfolk to Newport News, or from Newport News to Yorktown, as upon vessels boarded by the pilot outside of the capes of Virginia and piloted to the ports of Norfolk, Newport News or Yorktown. If this could be the construction of the act, the logical result would be that a vessel having come into the port of Norfolk with a cargo, after having paid pilotage to Norfolk, and having discharged her cargo at Norfolk, and going to seek a cargo at Newport News, would have to pay the same pilotage for entering and leaving the port of Newport News as it paid for the original entry to the port of Norfolk; and this burden would be multiplied by the number of ports within the State of Virginia, to which she would have to go to take a complete cargo for her outward trip. The act of 1866 would, by this construction, impose an intolerable burden upon commerce, rather than simply secure equality of treatment between these various classes of vessels when engaged in the same voyages. But if, as we contend *under* the act of 1866 was intended only to secure equality of treatment under the pilotage laws between these various classes of vessels as such when performing the same voyages, the construction imposes no onerous burdens upon commerce, but tends to the preservation of "that equality of commercial *the* rights and freedom from States interference," in the commerce between the States which seems to have been so earnestly desired by the framers of our Constitution.

The statutes of Virginia are not in conflict with this construction of the act of 1866. Every vessel entering the capes of Virginia bound for the designated ports, whether the vessel belongs to the first class enumerated in the statute, viz:—sailing between the ports of the State, or to the second class -numerated in the statute viz:—sailing between the ports of another State and the ports of this State, pays the same rate of pilotage. And any vessels sailing from the port of another State, having entered one of the ports designated in the Virginia statutes, may sail between that port and any other of the ports of the State of Virginia (just as vessels habitually sailing between the ports of Virginia) without the payment of any pilotage.

We are pointed to the cases of Spraigue *vs.* Thompson, 118 U. S. Rep. 90 and Freeman *vs.* The Undaunted, 37 Fed. Rep. p. 622, as sustaining a construction of the act of 1866 at variance with the construction contended for by us. We contend that a careful consideration of these cases, and of the State laws which they construe, will show that these decisions are entirely consisted with construction of the act of 1866, for which we contend.

The statute of Georgia, which is construed by the court in the case of Spriague *vs.* Thompson, provides as follows:—

"Any person, master, or commander of a vessel bearing toward any of the ports or harbors of this State, except *coasters in this State, and between the ports of this State and those of South Carolina and between the ports of this State and those of Florida*, who refuses to receive a pilot on board, shall be liable, on his arrival at such ports in this State, to pay the first pilot who may have offered his services outside the bar, * * *, the full rates of pilotage established by law for such vessels."

Sections 2466 and 2468 of the Political Code of California, which are construed in the case of Freeman *vs.* The Undaunted, after imposing half pilotage on vessels when a pilot is declined exempts "from all charges for pilotage, unless a pilot be actually employed, a vessel "coasting between San Francisco and any port in Oregon or in Washington or Alaska Territories, and all vessels "*coasting*" between the ports of this State."

It will be observed that in both of these cases, the statutes under construction exempted, as a class, vessels "*coasting* between the ports of this (such) State."

But pilotage charges (or half pilotage charges) are, by the laws of those States, imposed upon all vessels entering the ports of those States except those vessels which are "*coasters*," or "*coasting*"
11 between the ports "of such States—in other words, upon vessels sailing between the ports of another State, and the ports of the said State: *i. e.* upon the vessels of the second class enumerated in the act of 1866.

Th-se decisions seems to us, therefore, to consider the act of 1866 as classifying vessels as we have above classified them, and determin-g that no discrimination in the rates of pilotage shall be made between these classes of vessel-, as such; and that the acts of the States of Georgia and California do make such a discrimination between those classes of vessels.

"Coaster" is defined as "a vessel *engage-* in the coasting trade; and "coasting" as "the practice of sailing along a coast, as for trading."

Standard Dictionary.

These definitions are, it is contended, the same as the accepted meaning of these words in shipping, or maritime circles. A "coas-er" is a vessel habitually engaged in the coasting trade. A vessel "coasting between certain ports, is a vessel habitually engaged in the coasting trade between such ports. Both terms define the class of vessels by their habitual voyages. Under the laws of the States of Georgia and of California, only this class of vessels, viz.:—"coasters," or "coasting" between ports of the State, are exempted from the pilotage charges? A vessel sailing from the port of another State, (say Maine) to the ports of Georgia or of California, having arrived at a port in either State, and desiring to sail for another port in the same State, would not be considered, in the common acceptation of the term, a "coaster" between the ports of the

State of Georgia, or between the ports of the State of California, and would not be entitled, under the laws of those States, to the same exemption from pilotage charges which is accorded by those laws to vessels habitually engaged in the coasting trade between the ports of each of said States.

Thus, it seems to us, that these two cases confirm our construction of the classification of vessel- under the act of 1866, and furnished flagrant examples of a discrimination in pilotage rates between such classes of vessels, which is intended to be prohibited by the said act. No such discrimination is made by the statutes of Virginia other facts existing in each of those cases might be pointed out to distinguish them from the case at bar, and to show the propriety of the decision of the courts in those cases, without necessarily involving the determination of the particular point under discussion here.

To recapitulate briefly: Our contention is, that the act of
12 1866 (sec. 4237 Rev. Sts.) is intended to secure equality of treatment, in respect to pilotage charges, of all vessels of the several classes enumerated in the said act, when engaged upon the same voyage.

We respectfully submit the foregoing as our answer to the 1st and 2nd grounds assigned for the defendant's demurrer to the plaintiff's amended declaration, and for answer to the other assigned grounds of demurrer we submit the following:

The 3rd ground assigned for the demurrer, is that the Virginia statutes violate that provision of the Constitution of the United — which declares that the "citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." To this we reply that there is no provision in the Virginia statutes which gives to the citizens of that State any privilege or immunity not enjoyed by the citizens of the several States, except that no one, *not a citizen of Virginia*, can become a licensed pilot. This provision, we submit, does not contravene the constitutional declaration above referred to.

What are the privileges and immunities of citizens in the several States may be difficult to determine in any given case. We find in a leading case on this subject that "the right of a citizen of one State to pass through, or reside in, any other State for the purposes of trade, agriculture, professional pursuits, or otherwise," enumerated as some of these privileges and immunities.

Corfield *vs.* Corell, 4 Wash. (U. S. Cir. Ct. Rep.) 371, 380.

In another well considered case we find it said that they "do not mean the right of election, of being elected, or of holding offices."

Campbell *vs.* Morris, 3 Har. & McH. (Md.) 554.

If a State has the right to say that none but citizens shall vote, it would seem to follow that it has the right to say that none but those entitled to vote shall hold office in the State; and we submit

that it is not going too far to claim that a pilot licensed under the Virginia statutes is a State officer.

He is examined and licensed by a board of commissioners, appointed by designated courts of the State for that purpose. He must first apply to the proper court for a certificate of his eligibility for examination and license, and is required to give a bond for the performance of his duties. The performance of his duties is obligatory; and, in respect to quarantine, he has imposed upon him some of the duties of a health officer.

13 In view of the importance of his duties to the commercial interests of the State, of the necessity of his being a person of sobriety and intelligence, and of his having an intimate knowledge of the waters of the State, it is reasonable that the State should impose upon him an official relation to the State; and we contend that the statutes have done this—at least to the extent of differentiating his duties from those "fundamental" privileges which the Constitution provides shall be common to the citizens of the several States.

But, if we should be wrong about this, what is the result? Only to declare this prerequisite to eligibility to be void, which would not at all destroy the purposes, or affect the efficiency of this system of laws regulating pilotage in the waters of the State of Virginia.

The 4th ground of the demurrer: that the Virginia statutes are repugnant to that provision of the Constitution of the United States which prohibits any State from making or passing "any law which will abridge the privileges or immunities of citizens of the United States"—is so closely to the third ground of demurrer, that the preceding views, if sound as applied to the third ground of demurrer, are a complete answer to the 4th, also.

To the 5th. ground of demurrer:—that the Virginia statutes are in conflict with section 4236 U. S. Revised Statutes, which provides that "the master of any vessel coming into or going out of, any port situated upon waters which are the boundary between the two States, may employ any pilot licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port"—we say, that no one of the ports of entry or departure as to which our statute requires a vessel to employ a Virginia pilot, is situate upon waters which are the boundary between two States, they are all upon waters which are entirely intra-Virginia waters. This is a fact, of which the court will take judicial cognizance, and will appear by a comparison of the statute with the map of the State.

The 6th ground of demurrer:—that the State law violates the "inter-state commerce" provision of the Constitution—has been settled adversely to the defendant by the case of Cooley *vs.* Wardens *ubi supra.*

The 7th. ground of demurrer was not insisted on in the argument in the lower court, and is believed to have been abandoned by the defendant.

For these reasons we confidently contend that the lower
14 court erred in its judgment aforesaid, sustaining the defendant's demurrer to the plaintiff's amended declaration aforesaid, and giving judgment to the said defendant upon his said demurrer, and we respectfully pray that the said judgment may be review- and reversed.

The importance of the questions involved in this case—not only to the plaintiff and the Virginia Pilots' Association, but to the commerce of the entire State—involving, as they do, the existence of an entire system of State laws, is so great that the petitioner here gives notice that, if a writ of error be awarded him, he will, as soon as possible, under the rules of this court, apply to have this case put upon the privileged docket of the court, so as to have as speedy a trial as possible.

Respectfully submitted.

JOSEPH J. DARDEN.

By R. C. MARSHALL,
BROOKE & ELLIOTT,
JNO. W. DANIEL, *p. q.*,
His Attorneys.

I hereby certify that the judgment hereinabove complained of should, in my opinion, be reviewed by this honorable court.

D. TUCKER BROOKE,
Attorney Practicing in the Supreme Court of Appeals of Virginia.

Writ of error awarded. Bond $100.

JAMES KEITH.

February 27, 1903.

To the clerk of the supreme court of appeals of Virginia, at Richmond.

15 VIRGINIA:

Pleas before the court of law and chancery of the city of Norfolk at the courthouse of said city on Thursday, the 12th day of February, 1903.

Be it remembered that heretofore to-wit: at rules held in the clerk's office of said court on the first Monday in September, 1902, came Joseph J. Darden, pilot, by his attorneys, and filed his declaration in the words and figures following:

(Declaration omitted by direction of counsel.)

Whereupon the defendant being summoned and failing to appear; a conditional judgment was entered against him.

And afterwards: at rules held in said office on the second Monday in September, 1903, came again the plaintiff by his attorneys and the defendant still failing to appear, the conditional judgment was confirmed and a writ of enquiry awarded.

And afterwards, to-wit: in the court of law and chancery of the city of Norfolk on the first day of October, 1902.

JOSEPH J. DARDEN (Pilot)
vs.
A. P. THOMSON (Master, &c.).

In assumpsit and on an attachment.

This day came the plaintiff by his attorney and the defendant appeared by Hughes and Little, his attorneys, and thereupon the said defendant filed his demurrer to the plaintiff's declaration and to each count thereof, and his plea of non-assumpsit, and the plaintiff joined in said demurrer and replied generally to the said plea. Whereupon it is ordered that the judgment entered herein at rules be set aside.

(Copies of demurrer and pleas omitted by direction of counsel.)

And afterwards—in said court on the 11th day of October, 1902.

This day came again the parties by their attorneys and the defendant's demurrer to plaintiff's declaration being argued is
16 sustained. And on motion of the plaintiff leave is granted him to file an amended declaration in this case.

And afterwards—in said court on the 17th day of November, 1902.

This day came again the parties by their attorneys and thereupon the plaintiff filed his amended declaration and the defendant filed his demurrer thereto and pleaded non-assumpsit and the plaintiff joined in said demurrer and replied generally to said plea.

Amended Declaration.

In the Court of Law Chancery of the City of Norfolk, Virginia.

JOSEPH J. DARDEN
vs.
A. P. THOMPSON.

Joseph J. Darden, (pilot) plaintiff, complains of A. P. Thompson, master of the schooner "Wm. Neely," defendant, said schooner at the time of the acts complained of belonging to residents and citizens of the State of Maine, and engaged in the coastwise trade be-

tween Virginia and New England and not holding a coastwise pilot license, of a plea of trespass on the case in assumpsit, for that whereas on the 1st day of August, 1902, the said plaintiff was a pilot duly licensed under the laws of the State of Virginia, and on said date offered his services as such licensed pilot to the said A. P. Thompson, master of the said schooner, Cape Henry bearing west of south, from sea to Norfolk city, Virginia, whither she was bound, and then and there the proffer of the said pilot's services was refused and demand was then and there made by the plaintiff upon the said master of the said schooner for the value of the said services in the sum of $87.75, pilotage, which demand was then and there refused by the said master of the said schooner; that the said master of the said schooner has failed to deposit and refused to deposit with some responsible person to the order of the said plaintiff the said sum of $87.75 for pilotage aforesaid; nevertheless, the said defendant, not regarding his said promise and undertaking, has not, although thereunto often requested, as yet paid to the said plaintiff the said — of money, or any part thereof, but so
17 to do hath hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the plaintiff $175.00, and therefore he brings his suit, &c.

R. C. MARSHALL,
D. TUCKER BROOKE, *p. q.*

Demurrer.

In the Court of Law and Chancery of the City of Norfolk, Virginia.

A. P. THOMPSON
ads.
JOSEPH J. DARDEN.

Demurrer.

The defendant, by his attorneys, comes and says that the declaration is not sufficient in law, and for cause of demurrer assigns that the statute of the State of Virginia respecting pilotage, on which said declaration is based, is unconstitutional and void and in conflict with the laws of the United States in the following particulars:

1. It is in conflict with section ten article 1 of the United States Constitution wherein it is provided that:

"No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State

and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article 4, section 2, paragraph one of the United States Constitution wherein it is provided that the
18 citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section one of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States.

5. It is in conflict with section 4236 of the United States Revised Statutes which provides as follows:

"The master of any vessel coming into or going out of any port situate upon waters which are the bound-ry between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article one, section 8 paragraph 3 of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons.

HUGHES & LITTLE, *p. d.*

And afterwards: in said court on the 31st day of January, 1903.

This day came again the parties by their attorneys and the defendant's demurrer to plaintiff's amended declaration being argued is sustained.

And now at this day to-wit: in the court of law and chancery of the city of Norfolk on the 12th day of February, 1903.

JOSEPH J. DARDEN (Pilot), Plaintiff,
vs.
A. P. THOMPSON, Master of the Schooner "Wm. Neeley," Def'd'nt.

In assumpsit.

This day came again the parties by their attorneys and the court having heretofore sustained the defendant's demurrer to the
19 plaintiff's amended declaration. It is therefore considered by the court that the plaintiff take nothing by his bill but for his false clamor be, in mercy, &c., and that the defendant go

thereof without day and recover against the plaintiff his costs by him about his defence in this behalf expended.

To which ruling and judgment of the court, sustaining said demurrer and entering judgment for the defendant, the plaintiff excepts.

VIRGINIA:

In the clerk's office of the court of law and chancery of the city of Norfolk, on the 16th day of February, 1903.

I, James V. Trehy, clerk of the said court of law and chancery of the city of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of Joseph J. Darden, (pilot) plaintiff, against A. P. Thompson, master of the schooner "Wm. Neely," defendant, lately pending in said court.

I further certify that said copy was not made up and completed until the defendant had had due notice of the making of the same, and the intention of the plaintiff to take an appeal therein.

Given under my hand this 16th day of February, 1903.

JAMES V. TREHY, *Clerk.*

Fee for this record :—$3.00.

It is agreed that the above transcript contains all that is necessary for the proper decision of this case in the appellate court.

R. C. MARSHALL, BROOKE & ELLIOTT, *p. q.*
HUGHES & LITTLE, *p. d.*

A copy—
Teste: GEO. K. TAYLOR, *C. C.*

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21 To the honorable judges of the supreme court of appeals of Virginia:

The defendant, Abram P. Thompson, by which name as well as by the name of A. P. Thompson, he is called and known, represents that he is aggrieved by a final judgment of the court of law and

chancery of the city of Norfolk in a suit wherein Joseph J. Darden, pilot, was plaintiff, and the said petitioner was defendant, the said judgment having been entered in said court on the 29th day of October, A. D. 1903. A transcript of the record since this same case was last before this court is hereto attached, from which, in conjunction with the previous part of the record already on file in this court, it will appear that Joseph J. Darden brought an action of assumpsit at common law against this petitioner for a tender of pilotage service, as will more fully appear by the declaration in the cause. This defendant demurred to the declaration on the grounds set out in said demurrer, which set up that the pilot law of the State of Virginia was in conflict with the Constitution of the United States. The demurrer was sustained in the court of law and chancery, and thereupon the said Joseph J. Darden took this case by a writ of error and supersedeas to this court. On the 19th day of June, A. D. 1903, your honors reversed the decision of the court of law and chancery, and held that the said pilot law was not in conflict with the Constitution of the United States, and remanded the case with instructions to the lower court to over-rule the demurrer and for further proceedings not in conflict with the opinion of this court filed in the record. The said order of this
22 court and opinion are set out in the record hereto attached.

Thereupon the case came on for trial again in the court of law and chancery, and resulted in a verdict for plaintiff. This defendant thereupon moved an arrest of judgment, raising the same questions of constitutionality, but the court over-ruled the said motion in arrest of judgment and entered a verdict for plaintiff. The petitioner alleges that the court erred in holding the law to be constitutional and in refusing to give the instruction asked for by defendant and set out in his bill of exceptions, and in overruling his motion in arrest of judgment.

Wherefore the petitioner prays that this court would issue a writ of error to the said judgment and that the same be reviewed and reversed.

ABRAM P. THOMPSON,
By ROB'T M. HUGHES,
His Attorney.

I, Robert M. Hughes, an attorney at law practicing in the supreme court of appeals of Virginia, certify that there is sufficient matter of error in the record accompanying this petition to render it proper that the same be reviewed.

ROB'T M. HUGHES.

23 VIRGINIA:

Pleas before the court of law and chancery of the city of Norfolk, at the court house of said city, on Monday, the 9th day of November, 1903.

Be it remembered that heretofore, to-wit: in the court of law and chancery of the city of Norfolk on the 16th day of July, 1903. The following judgment of the supreme court of appeals was this day received and is here entered as the judgment of this court, viz:

"VIRGINIA:

"In the Supreme Court of Appeals Held at the Court-house of Wythe "County, in the Town of Wytheville, on Thursday, the 18th Day "of June, 1903.

"JOSEPH J. DARDEN, Pilot, Plaintiff in Error,
"*against*
"A. P. THOMPSON, Master of the "Schooner Wm. Neely, Defendant in Error.

Upon a Writ of Error to a Judgment Rendered by the Court of Law and Chancery of the City of Norfolk on the 12th Day of February, 1903.

"This day came again the parties by counsel and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel is of opinion, for reasons stated in writing and filed with the record, that the plaintiff's declaration stated a good cause of action; and that the trial court erred in sustaining the demurrer thereto.

"It is therefore adjudged, ordered and decreed that the judgment aforesaid be reversed and annulled, the demurrer overruled, and that this cause be remanded to the said court of law and chancery of the city of Norfolk with leave to the defendant to plead if he "be so advised and for further proceeding to be had therein
24 "not in conflict with the views expressed in this court's opin-"ion. And it is further ordered that the plaintiff in error recover of the defendant in error his costs by him in this behalf herein expended. Which is ordered to be certified to the said court of law and chancery of the city of Norfolk.

"A copy.

"Teste:—

"J. M. KELLY, *Clerk.*

"*Plaintiff in Error's Costs.*

"Clerk's fees, printing and writ tax.....	$37.05
"Transcript.....	3.00
	"$40.05

"Teste:— J. M. KELLY, *Clerk.*"

And thereupon it is ordered that said case be reinstated on the docket of this court for further proceedings to be had therein.

Opinion of Court.

DARDEN, Pilot,
vs.
THOMPSON, Master Schooner "Wm. Neely."

Opinion by Judge John A. Buchanan;
Wytheville, Va., June 18, 1903.

Corporation Court, City of Norfolk.

The plaintiff in error, who was the plaintiff in the trial court, filed his declaration which was afterwards amended, in which he averred that he was a licensed pilot under the laws of this State; that on the 1st day of August, 1902, off Cape Henry he offered his services as pilot to the defendant, the master of the "Wm. Neely," a schooner belonging to residents and citizens of Maine and engaged in coastwise trade between Virginia and New England, (and not
25 holding a coastwise pilot license) which was making her way at that time from the sea near Cape Henry to Norfolk, Virginia, whither she was bound; that his services were declined; that demand was then and there made upon the defendant for their value, to-wit, $87.75, which demand was refused by the defendant who refused and still refuses to pay or deposit the same as required by the statute in such case made and provided, and that by reasons of the premises a right of action has accrued to the plaintiff to recover the said sum.

The defendant's demurrer to the declaration was sustained and final judgment rendered in his favor. To that judgment this writ of error was awarded.

Whilst a number of grounds of demurrer, was assigned, only one was considered by the trial court and only one is relied on here, and that is, that the pilot laws of Virginia upon which the declaration is based are inoperative and void, because in conflict with section 4237 of the Revised Statutes of the United States, which provides that "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam or against national vessels of the United States; and all existing regulartions or provisions making any such discriminations are annulled and abrogated." The sections of the Virginia statute upon which this action is based are as follows:

"1965. The master of every vessel (other than a coasting vessel having a pilot license), inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of

south to Smith's point, Yorktown, Newport News, or Norfolk, or any intermediate points; and any such vessel, outward bound,
26 shall take the first pilot that offers his services at Smith's point, Yorktown, Newport News, or Norfolk, or any intermediate point, to sea; and any master, refusing to do so, shall immediately pay to the said pilot full pilotage from the sea to Newport News, Smith's point, Yorktown, or Norfolk, or from said ports to sea, as the case may be; but no master of a vessel coming from sea shall be compelled to take a pilot after arriving within the line at which Cape Henry bears west of south; provided however, that any registered vessel arriving within the line of Cape Henry, bearing west of south, without having taken a pilot, bound for Norfolk, Newport News, or Richmond, shall not be liable for pilotage; but the master may pilot his own vessel to Hampton Roads, and there employ any steamboat or tow-boat to tow his vessel to her port of *of* destination; provided, that in no instance shall any master be allowed to employ any steamboat or towboat below Hampton Roads without paying full pilotage to the first regular pilot that offers his services to said vessel; and any master so employing a steamboat or towboat below Hampton Roads without a pilot on board of such vessel, when one shall have offered his services, shall be liable to the penalty prescribed in section nineteen hundred and sixty three. This provision shall apply only to inward bound vessels."

"1969. Pilots shall have pilotage at the following rates: For every vessel owned by a citizen of the United States, and for every vessel owned by a citizen or subject of any foreign State, whose vessels are by treaty placed on the same footing as vessels of the United States, if the vessel be spoken or boarded to the eastward of Cape Henry, there shall be paid for each foot the vessel draws, as follows: From sea to Smith's point, West point, Newport News, Norfolk or any place between Smith's point, West point, Newport News, or Norfolk, vessels drawing ten feet and under, two dollars and fifty cents; vessels drawing thirteen feet and over ten feet, three dollars; vessels draw-
27 ing fourteen feet and over thirteen feet, three dollars and fifty cents; vessels drawing sixteen feet and over fourteen feet, four dollars; vessels drawing over sixteen feet, four dollars and fifty cents. If the vessel be board- or spoken twenty miles or more eastward of Cape Henry, twenty five cents per foot shall be added to the foregoing rates. There shall be paid the same pilotage from Smith's point, West point, Newport News, or Norfolk, or any intermediate point to sea, as from sea to those places; and from Newport News to Jamestown, or any place between Newport News and Jamestown, one dollar and thirty-five cents per foot; from Newport News to Richmond, or any plave between Jamestown and Richmond, two dollars and fifty cents per foot; and the same rates of pilotage shall be paid from said places, respectively, down. Vessels coming from sea to Hampton Roads and thence to any port

in Maryland, shall be subject to the same rate of pilotage as vessels bound from Newport News to sea. All vessels coming to Hampton Roads, seeking, in ballast, shall only pay one half pilotage in and one-half out; provided however, that if such vessel coming into Hampton Roads seeking, is afterwards chartered to load in any port or place in this State, she shall pay the usual pilotage in and out as though she had come to a direct port. All steamers calling in any port or place in this State for the sole purpose of coaling shall only pay one-half pilotage in and one-half pilotage out. All vessels that go from Norfolk to Newport News to load or finish loading, and all vessels that go from Newport News to Norfolk to load or finishing loading, shall, if they take a pilot (which shall be optional with the master), pay a fee of ten dollars to the pilot for transporting any such vessel to or from either place."

By the provisions of the sections of the Code quoted all vessels (except coastwise vessels with a pilot license) inward bound from the sea to Smith's point, Yorktown, Newport News or Norfolk, or any intermediate point, and all such vessels outward bound to the sea from Smith's point, Yorktown, Newport News or Norfolk, or any intermediate point, are subject to the compulsory regulation and rates therein provided. All vessels are subject to the same regulations and under the same circumstances and conditions are required to pay the same fees.

There is clearly nothing in those statutes which expressly make any discrimination between such vessels. But the contention of the defendant is, that our pilotage system violates section 4237 of the Revised Statutes since it imposes no pilotage rates between Virginia ports, nor between Virginia ports and Maryland ports which can be reached without going to sea, nor upon vessels bound to or from any point upon the Potomac river, thereby throwing the whole burden of keeping up the compulsory pilotage system upon interstate, and not upon both internal and interstate commerce as was intended by section 4237.

That contention raises the question whether or not a State can establish a compulsory system of pilotage as to vessels coming from the sea into her inland ports and as to vessels going from her inland ports to the sea without also establishing a compulsory system of pilotage as to vessels trading between her inland ports respectively or between her inland ports and the ports of another State which can be reached without going to sea. If she cannot, then a State may be compelled to burden commerce with a pilot system upon her inland waters where such a system is not needed in order that she may establish the system where it is absolutely necessary for the protection of life and property. That she is not required to do this is plain, we think, from the nature of the subject and from the declarations of Congress and the Supreme Court of the United States on the subject.

By an act of Congress August 7, 1789, sec. 4, it was declared "That all pilots in the bays inlets, rivers, harbors and ports of the

United States, shall continue to be regulated in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose until further legislative provision shall be made by Congress."

In the case of Cooley *v.* Board of Wardens of the Port of Philadelphia, 12 How. 299, 319, it was said that the power to regulate commerce embraces a vast field containing not only many but exceedingly various subjects quite unlike in their nature; some imperatively demanding a single uniform rule operating equally upon the commerce of the United States in every port, and some like the subject (pilotage) now in question as imperatively demanding that diversity, which alone can meet the local necessities of navigation. * * * The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of the subject is such that until Congress should find it necessary to exert its powers it should be left to the legislation of the States; that it is local and not national; that it is likely to be best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits. The practice of the States and of the National Government has been in conformity with this declaration from the origin of the National Government until this time (1851); and the nature of the object when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity of different systems of regulations, drawn from local knowledge and experience and conformed to local wants."

The decision from which we have quoted was made prior to the enactment of section 4237 of the Revised Statutes, but in the subsequent case of *In re* Alexander McNiel, 13 Wall., 236, 242, that section and the prior acts of Congress on the subject of pilotage are referred to and the decision in the case of Cooley *v.* Board of Wardens approved. In following that case the court said: "We are entirely satisfied with that adjudication and to reaffirm the doctrine which it lays down."

None of the decisions of the Supreme Court to which we have referred indicate any change in the views of that court that pilotage "is local and not national; that it is likely to be best provided for not by one system or plan of regulations, but by as many as the legislatures of the several States should deem applicable to the local peculiarities of the ports within their limits."

None of them seem to us to indicate that the effect of section 4237 of the Revised Statutes was to require a State, if it legislated at all upon the subject, to enact an uniform system of pilot regulations operating alike upon all her ports, without regard to their local peculiarities or necessities.

The State statute which was held in Sprague *v.* Thompsin, 118 U. S., 90, to be in conflict with section 4237 of the Revised Statutes

expressly excepted from its operation the coasting vessels of the State of Georgia and the vessels trading between the ports of that State and the ports of South Carolina and Florida when but for the exception in the statute such vessels would have been subject to the same compulsory pilotage regulations. Under precisely the
31 same circumstances and conditions pilot fees were required from vessels coming from ports other than those of Georgia, South Carolina and Florida—whilst the vessels of thos- three States were exempted therefrom.

The sections of the Virginia statute in question do not exempt vessels trading between the inland ports of Virginia or vessels trading between the inland ports of Virginia and the ports of Maryland which can be reached without going to sea. Such vessels do not come within the operation of the compulsory pilot laws of the State, because they do not pass through the capes. There is no discrimination in their favor unless, as before said, the State cannot have compulsory pilot regulations as to vessels coming into her inland ports from the sea and going from those ports to the sea without also having a compulsory pilot system as to vessels trading between her inland ports respectively and between such ports and the ports of Maryland which can be reached without going to sea.

Neither, in our opinion, does section 1990 of the Code, which provides that no vessle bound to or from any point on the Potomac river shall be required to pay pilotage conflict with the act of Congress (sec. 4237) That section was probably enacted for the purpose of conforming our pilot regulations to the congressional provisions now found in section 4236 of the Revised Statutes, which provides "that the master of any vessel coming into or going out of any port situate upon the waters which are the boundary between two States may employ any pilot duly licensed or authorized by the laws of either of the States bounden on such waters to pilot the vessel to or from such port." But whether it was or not the exemption from the compulsory pilot regulations of the State provided for by it do not make any discrimination as to vessels or ports. All vessels bound to or from any point on the Potomac are exempted, no matter to what points they are bound or from what ports they may come.

32 The pilot regulations of this State, whether compulsory or optional, operate alike upon all vessels under the same circumstances and conditions without regard to the ports from which they come or to which they go.

We are of opinion, therefore, that the pilot regulations of this State upon which the plaintiff's action is based are not in conflict with the acts of Congress upon the subject; that the plaintiff's declaration stated a good cause of action; and that the trial court erred in sustaining the demurrer thereto.

The judgment complained of must be reversed, the demurrer overruled and the cause remanded with leave to the defendant to

plead if he be so advised, and for further proceedings not in conflict with the views expressed in this opinion.

And afterwards in said court on the 29th day of October, 1903.

JOSEPH J. DARDEN (Pilot), Plaintiff,
v.
A. P. THOMPSON, Master of the Schooner "Wm. Neely," Defendant. } In Assumpsit.

This day came again the parties by their attorneys and thereupon by consent of parties came a jury of eleven to-wit: G. Nusbaum, C. T. Townley, James Barkley, George T. Banks, O. T. Baxter, W. W. Alfriend, J. Y. S. Mitchell, Jno. P. Kevill, A. S. Cooper, A. B. Duesberry and F. E. Stinchfield, who being sworn the truth of and upon the premises to speak and having heard the evidence returned a verdict in these words: "1903 Oct. 29, We the jury find for the plaintiff and assess his damages at $87.75 with legal interest thereon from the 1st day of August, 1902." Whereupon the defendant moved the court to set aside the said verdict and grant him a new trial on the grounds; 1st. That the verdict is contrary to the law and the evidence; 2nd. That the court erred in refusing
33 to grant the defendant's instruction; and 3rd. That the damages assessed are excessive, which motion being argued is overruled. And thereupon the defendant moved in arrest of judgment on the ground that chapter 89 of the Virginia Code of 1887 on which the plaintiff bases his right to recover is unconstitutional and void in the following particulars:

1. It is in conflict with section 10 article 1 of the United States Constitution wherein it is provided that: "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." 2. It is in conflict with section 4237 of the United States Revised Statutes which provides: "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between ports of different States or any discrimination against vessels propelled in whole or in part by steam or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article 4, section 2 paragraph 1 of the United States Constitution wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. 4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty or property without due process of law. 5. It is in conflict with

section 4236 of the United States Revised Statutes which provides as follows; "The master of any vessel coming into or going out of any port situate upon waters which are the boundary be-
34 tween two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters to pilot the vessel to or from such port." 6. It is in conflict with article 1. section 8 paragraph 3 of the United States Constitution which provides that Congress shall regulate the commerce among the several States and with foreign nations and that no State shall lay any duty on tonnage. 7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons:—And the said motion in arrest of judgment being argued is overruled.

Therefore it is considered by the court that the plaintiff recover against the defendant the sum of eighty-seven dollars and seventy-five cents ($87.75) with interest thereon to be computed after the rate of six per centum per annum from the first day of August 1902 according to said verdict until payment and his costs by him about his suit in this behalf expended. And the said defendant in mercy &c.

Memorandum.—Upon the trial of this case the defendant excepted to the ruling of the court refusing to set aside the verdict of the jury and grant him a new trial, and to the ruling of the court overruling his motion in arrest of judgment and also to the judgment entered on said verdict, and leave is given him to file his bill of exceptions at a future day.

And at the instance of the defendant who desires to present a petition for a writ of supersedeas to the foregoing judgment execution thereof is suspended for the period of ninety days from this day when the said defendant or some one for him shall give bond before the clerk of this court in the penalty of $150.00 with good security and with a condition reciting such judgment and the intention of said defendant to present such petition and providing for the payment of all such damages as may accrue to any per-
35 son of the said suspension in case a supersedeas to such judgment shall not be allowed and be effectual in the said period of ninety days.

And now at this day to-wit:

In the Court of Law and Chancery of the City of Norfolk, on the 9th Day of November, 1903.

JOSEPH J. DARDEN, Pilot, Plaintiff,
v.
A. P. THOMPSON, Master, &c., Defendant. } In Assumpsit.

This day came again the parties by their attorneys and thereupon the defendant, in pursuance of the leave heretofore granted, tendered his two bills of exceptions which were received, signed and sealed by the court and ordered to be made a part of the record.

Bills of Exceptions.

36 Be it remembered that on the trial of this cause the defendant moved the court to instruct the jury as follows:

"GENTLEMEN OF THE JURY: If you believe from the evidence in this case that the plaintiff is a licensed pilot, that the defendant was master of the schooner 'William Neely' on the first day of August, 1902, that the said schooner at that time belonged to nonresidents of the State of Virginia and was engaged in the coastwise trade between Virginia and New England and did not hold a pilot license, and that on the said day the plaintiff tendered his services as pilot to the said schooner Cape Henry bearing west of south, as she was bound from sea to Norfolk, that the said services were refused, that the plaintiff subsequent thereto demanded his pilotage fee of the defendant and that said demand was refused, and the defendant did not voluntarily employ the said plaintiff as pilot on his vessel on the day and year aforesaid, you must find for the defendant."

But the court refused to grant the said instruction, to which action of the court the defendant, by counsel, at the time of such ruling, excepted, and tendered this its bill of exceptions which it prays may be signed, sealed and made a part of the record in this case, and the same is done accordingly.

Reference is hereby made to bill of exceptions No. 2 which is by said reference made a part of this bill of exceptions in this cause.

WILLIAM BRUCE MARTIN. [SEAL.]

37 No. 2.

Be it remembered that on the trial of this cause the jury found a verdict in the words and figures following, to-wit:—

"We, the jury, find for the plaintiff and assess his damages at eighty-seven dollars and seventy-five cents, with interest thereon from the first day of August, 1902."

And thereupon the defendant, before judgment was entered upon said verdict, moved the court to set aside the verdict and grant him a new trial on the grounds:

1st. That the verdict was contrary to law and to the evidence adduced before the court at the trial of this cause.

2nd. That the court erred in refusing the defendant's instruction hereinbefore set out in bill of exceptions No. 1, which is hereby referred to as a part of this bill of exceptions.

3rd. That the damages are excessive.

But the court refused to set aside the said verdict and entered judgment thereon for the plaintiff, to which action of the court in refusing

to set aside said verdict and in entering the said judgment the defendant, by counsel, at the time of said action of the court, excepted and tendered this its bill of exceptions which it prays may be signed, sealed and made a part of the record in this case, and the same is done accordingly. And the court certifies the following to be the evidence adduced on the trial of this cause and that it was all the evidence which was adduced:

38 JOSEPH J. DARDEN, being duly sworn, testified as follows:

Capt. MARSHALL:

Q. What is your name?
A. Joseph J. Darden.
Q. What is your occupation, Mr. Darden?
A. Pilot.
Q. Were you, or were you not, a licensed pilot in August 1902?
A. I was.
Q. State the facts so far as the claim made for pilotage is concerned in regard to your speaking the schooner William Neely at that time?
A. I was on the pilot boat Relief, and spoke the schooner William Neely outside of Cape Henry; the captain refused the pilot,
39 and I made a memorandum of it and sent it to Norfolk to my agent, and he presented the bill, and the captain refused to pay it. Afterwards I was sent for to come up, and I swore out an affidavit as to speaking the vessel, and sued the captain or master for the amount of the bill.
Q. Do you recollect what was the amount?
A. Nineteen feet and a half.
Q. The rate allowed by law is how much a foot?
A. Four dollars and a half.
Q. Was the amount $87.75, do you remember?
A. I think so, yes.
Q. Was she coming in or going out?
A. Coming in.
Q. Was she loaded, or not?
A. Loaded deep, bound to Norfolk.

Cross-examination.

Mr. HUGHES:

Q. Do you know the vessel—has she been accustomed to use here, or not?
A. I had seen her once before that time, I think.

Capt. MARSHALL:

Q. She has come in frequently since?
A. Oh, yes. I have seen the captain, and talked to him at Newport News.

Mr. HUGHES:

Q. She is one of the coastwise schooners engaged in trade from here north?
A. Yes, sir.

Judge BROOKE:

Q. She was not licensed?
A. Not at that time, no, sir.

40 It is agreed that on the 1st day of August, 1902, the defendant was master of the schooner William Neely; that she was a coastwise schooner owned by non-residents of the State of Virginia and engaged in coastwise trade between Virginia and New England, and did not hold a coastwise pilot license at that time; that demand was made upon the master for the payment of the amount of $87.75 and the payment of same was refused.

WILLIAM BRUCE MARTIN. [SEAL.]

VIRGINIA:

In the clerk's office of the court of law and chancery of the city of Norfolk on the 3rd day of December, 1903.

I, James V. Trehy, clerk of the said court of law and chancery of the city of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of Joseph J. Darden, pilot, plaintiff, against A. P. Thompson, master of the schooner Wm. Neely, defendant, lately pending in said court.

I further certify that said copy was not made up and completed until the plaintiff had had due notice of the making of the same, and the intention of the defendant to take an appeal therein.

Given under my hand this 3rd day of December, 1903.

JAMES V. TREHY, *Clerk.*

Fee for this record: $7.50.

41 VIRGINIA:

In the Supreme Court of Appeals of Virginia, Held at the Library Building, in the City of Richmond, on the 8th Day of December, 1903.

This day the defendant, Abram P. Thompson, presented in open court his petition for a writ of error to the court of law and chancery of the city of Norfolk, and a supersedeas to the judgment rendered

against him in favor of Joseph J. Darden, pilot, in said court on October 29, 1903; but this court being of opinion that the said judgment in said case is plainly right, it is ordered that the said petition be rejected and that a writ of error and supersedeas be refused.

Transcript $15.50

42 In the Supreme Court of Appeals of Virginia, at Richmond, Virginia.

DARDEN, Pilot,
vs.
THOMPSON, Master Sch. Wm. Neely.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, H. Stewart Jones, clerk of the supreme court of appeals of Virginia, at Richmond, Virginia, do hereby certify that the foregoing printed record contained in nineteen pages and one page of index, and twenty-one additional manuscript pages, is a true and perfect transcript of the record of the suit aforesaid remaining in the clerk's office of the said court at the city of Richmond, Virginia, upon which said record the said case was heard, tried and determined by the court aforesaid.

In witness and attestation whereof I hereunto set my hand and affix the seal of said court at Richmond, Virginia, on this the 10th day of December, 1903.

[Stamp.]

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, James Keith, one of the judges and president of the supreme court of appeals of Virginia, do hereby certify that the attestation of the above record of Darden, pilot, *vs.* Thompson, master sch. Wm. Neely, remaining in the clerk's office of the said court at Richmond, Virginia, made by H. Stewart Jones, the clerk of said court at Richmond, aforesaid, is in due form.

Given under my hand and seal this the 10th day of December 1903.

JAMES KEITH. [SEAL.]

43 Supreme Court of Appeals of Virginia.

JOSEPH J. DARDEN, Pilot,
vs.
ABRAM P. THOMPSON.

Assignment of Errors.

Abram P. Thompson, the defendant, comes and files herewith his petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled cause, and makes the following assignment:—

First. The supreme court of appeals of Virginia erred in reversing the judgment of the court of law and chancery of the city of Norfolk on the demurrer, and in holding the Virginia pilot law not to be in conflict with the Constitution of the United States. The validity of said law was denied and drawn in question by the defendant in error on the ground of its being repugnant to the Constitution of the United States and in contravention thereof in the following particulars:

1. It is in conflict with section 10, article 1 of the United States Constitution wherein it is provided that: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

44 3. It is in conflict with article 4, section 2, paragraph 1 of the United States Constitution wherein it is provided that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty or property without due process of law.

5. It is in conflict with section 4236 of the United States Revised Statutes which provides as follows:—

"The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article 1, section 8, paragraph 3 of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons.

Second. The said court erred in refusing a writ of error and supersedeas to the court of law and chancery, which court refused to instruct the jury as prayed by this defendant in bill of exceptions No. 1, and also refused to set aside the verdict and grant a new trial on the grounds set out in bill of exceptions No. 2; also overruled the defendant's motion in arrest of judgment. All
45 these different motions and requests of the defendant raised the question of the constitutionality of the Virginia pilot law on the same grounds as those just above set forth.

For which errors the defendant, Abram P. Thompson, prays that the judgment of the supreme court of appeals of Virginia refusing a writ of error and supersedeas, which is dated December 8th, 1903, be reversed, and a judgment entered for the defendant and for costs.

ROB'T M. HUGHES,
Attorney for Abram P. Thompson.

46 Supreme Court of Appeals of Virginia.

JOSEPH J. DARDEN, Pilot,
vs.
ABRAM P. THOMPSON.

Petition for Writ of Error.

The defendant considering himself aggrieved by the final decision of the supreme court of appeals of Virginia in refusing him a writ of error in the above entitled cause to the court of law and chancery of the city of Norfolk, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors is hereto attached.

ROB'T. M. HUGHES,
Attorney for Defendant.

Supreme Court of Appeals of Virginia.

Let the writ of error issue upon the execution of a bond by the defendant, Abram P. Thompson, to the plaintiff, Joseph J. Darden, in the sum of two hundred dollars; said bond when approved to act as a supersedeas.

Dated December 8th, 1903.

JAMES KEITH,
President and Presiding Judge of the Supreme Court of Appeals of Virginia.

47 Supreme Court of the United States.

JOSEPH J. DARDEN, Pilot,
vs.
ABRAM P. THOMPSON.

Bond.

Know all men by these presents, that we, the Virginia-Carolina Trust Company, a corporation organized under the laws of the State of Virginia, with its principal office in the city of Norfolk, as principal, and Robert M. Hughes, as surety, are held and firmly bound unto Joseph J. Darden, in the sum of two hundred dollars, to be paid to the said Joseph J. Darden, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 8th day of December, A. D. 1903.

Whereas, the above-named defendant in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of appeals of Virginia;

Now, therefore, the condition of this obligation is such that if the above-named defendant in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

VIRGINIA-CAROLINA TRUST COMPANY,
By W. W. MOSS, *President.*

Attest: GEORGE J. TUOHY, *Secretary.*
ROB'T M. HUGHES. [SEAL.]

47½ The above bond is approved.

JAMES KEITH,
President and Presiding Judge of the Supreme Court of Appeals of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of appeals of Virginia on December 8th 1903, and the following endorsement made thereon: Bond. Filed, December 8th, 1903.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of Virginia before you, at Wytheville at the June term 1903 thereof, between Joseph J. Darden, plaintiff and Abram P. Thompson, defendant, a manifest error hath happened, to the great damage of the said defendant Abram P. Thompson as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and three.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia,
By JOSEPH P. BRADY,
Dep'y Clerk.

Allowed by
JAMES KEITH,
President Supreme Court of Appeals, Virginia.

[Endorsed:] Writ of error. Filed December 8, 1903.

49 The original of the foregoing writ of error was lodged with the clerk of the supreme court of appeals of Virginia on December 8th 1903, and also at the same time and place a copy thereof for the plaintiff, Joseph J. Darden. The following endorsement was made upon the said original writ and upon the copy: Writ of error. Filed, December 8th, 1903.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

50 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph J. Darden, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of appeals of Virginia, wherein you are plaintiff and Abram P. Thompson is defendant in error, to show cause, if any there be, why the judgment rendered against the said defendant in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of appeals of Virginia, this 8th day of December, 1903.

JAMES KEITH,
President and Presiding Judge of the Supreme Court of Appeals of Virginia.

Attest: H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Service accepted December 8th, 1903.
R. C. MARSHALL,
D. TUCKER BROOKE,
Attorneys for Joseph J. Darden.

51 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, } *ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court of appeals, in the city of Richmond, this December 10th, 1903.

[Stamp.]

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Endorsed on cover: File No. 19,170. Virginia supreme court of appeals. Term No. 519. Abram P. Thompson, plaintiff in error, *vs.* Joseph J. Darden. Filed December 18", 1903. File No. 19,170.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 519.

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN.

MOTION TO ADVANCE.

Statement.

This case was a suit for pilotage fees claimed by virtue of a tender of pilotage to the "William Neely," in command of Abram P. Thompson, and refused by him. It was brought in the court of law and chancery of the city of Norfolk, Virginia. The vessel was a coastwise vessel not holding a pilot's license. The plaintiff in error, by demurrer, raised the question that the Virginia pilot law was unconstitutional as respects coasting vessels.

The declaration in the case will be found on page 13 of the record, and the demurrer raising the question of constitutionality on page 14 of the record.

The case was argued in the court of law and chancery (the court of original jurisdiction) and was decided on February

12, 1903. This court sustained the demurrer, held the law to be unconstitutional, and, as no amendment could help the declaration, under these circumstances entered judgment for Abram P. Thompson, the vessel-owner. From that judgment Joseph J. Darden, the pilot, appealed to the court of appeals of Virginia. This court, on the 18th day of June, 1903, reversed the decision of the court of law and chancery, and remanded the case, with instructions to overrule the demurrer. Its mandate and opinion will be found on pages 18 *et seq.* of the record.

As this was not such a final judgment as could be appealed from, Abram P. Thompson, the vessel-owner, had to stand a trial in the court of law and chancery, and, under this decision of the court of appeals of Virginia, that trial, of course, resulted in a judgment for the pilot.

Thereupon Abram P. Thompson applied to the court of appeals of Virginia for a writ of error and supersedeas to the judgment of the court of law and chancery, but the court of appeals, in open court, refused the writ of error and supersedeas on the ground that the judgment was plainly right. This judgment of the court of appeals will be found on pages 28 and 29 of the printed record. Thereupon the case was brought by writ of error to this court.

FIRST GROUND.

This case is a test case on which sixty-six other similar cases are dependent.

This case is a test case, and was so intended by a large number of owners of coastwise vessels. When the court of law and chancery first held the Virginia pilot law unconstitutional, on February 12, 1903, these coastwise vessels refused to pay their pilotage fees, and matters continued in this situation until June 18, 1903, while the case was pend-

ing in the court of appeals of Virginia. After the decision of that court sustaining the pilot law and reversing the lower court, the pilots immediately proceeded to bring suits for all of the pilot fees which had accumulated during the interval. These suits now number as follows:

Circuit court of Norfolk county	28
Court of law and chancery of Norfolk city	1
Circuit court of Warwick county	9
Corporation court of Newport News	28
Total	66

The pilots, flushed with their victory in the court of appeals of Virginia, are pressing all of these suits and insisting upon a trial, and these suits are subject to call in the different courts where they are pending at various times during the next few months. If the lower courts set the cases for trial, of course the result in the State court with the existing State-court decision is a foregone conclusion. Under these circumstances the vessel-owners will be placed in the alternative of either paying up judgments for which they do not think they are liable, or taking a separate appeal in each one of these cases. As these separate appeals must go through the form of being presented to the court of appeals of Virginia and appealing from its order refusing the writ of error, and bonds must be given in each of the several courts, this means that it would cost probably two hundred and fifty dollars in each case to mature them for this court. The largest amount involved in any one of them is under two hundred dollars. Hence the first ground assigned for the motion to advance is that this is a test case and on it depends this large number of other cases.

SECOND GROUND.

This case involves the constitutionality of the Virginia pilot law, and it is important to both parties that their rights be settled as early as possible.

The Virginia pilot law will be found in sections 1955 to 1990 of the Virginia Code of 1887. There are hundreds of vessels that come into the Virginia capes yearly, specially at this season when the coal-shipping business from Lambert's point and Newport News is active. In the present unsettled state of the law, with contradictory decisions in the two courts as to its constitutionality, there must be necessarily great embarrassment on both sides as to their relative rights. The law, if valid, is based upon the theory of its being a police regulation. The entire commerce of the State is interested in its prompt settlement one way or the other, now that the question has been raised.

THIRD GROUND.

Unless the case is advanced, the vessel-owners will be at a loss whether or not to renew their annual licenses.

In consequence of the fact that no fees were paid during the interregnum between the decisions of the lower court against the constitutionality of the act, on February 12, 1903, and the decision of the court of appeals in favor of its constitutionality, on June 18, 1903, the accumulated licenses of months were renewed during the months of July, August, and September, as these vessels came in.

Under the Virginia pilot law trip pilotage is regulated by the draft of the vessel, but under section 1967 of the Code, which is part of this law, vessels have the option of taking out an annual license at the price of ten cents per registered ton. This, though a very large sum when assessed upon the immense schooners that are now being built, is much cheaper than to pay trip pilotage in case the vessel makes frequent voyages. Consequently, while the parties interested in this contest refused to pay the trip pilotage already incurred during the above interregnum, they took out licenses in July, August, and September, 1903, to prevent the accumulation of too large a risk, thinking that this case would probably be finally settled by the time their licenses ran out. Unless it can be advanced, they will be under the necessity during the coming summer of again renewing their licenses for another year, thereby putting themselves in the position of again submitting to a law which they consider inequitable; for where two learned courts have differed no one can pretend to give any absolutely certain opinion as to the final result, and the accumulation of trip pilotages will make too heavy an ultimate liability in the event of a final decision in favor of the constitutionality of the law.

CONCLUSION.

Wherefore Abram P. Thompson, the plaintiff in error, moves this court to advance the hearing of this cause.

Respectfully submitted.

ROB'T M. HUGHES,
Counsel for Abram P. Thompson,
Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1903.

ABRAM P. THOMPSON, *Plaintiff in Error,*
vs.
JOSEPH J. DARDEN, *Defendant in Error.*
No. 519.

NOTICE OF MOTION.

To JOSEPH J. DARDEN, *Pilot:*

Take notice that on Monday, March 21, 1904, between the hours of twelve and four, I will move to advance the hearing of the above-entitled cause.

ABRAM P. THOMPSON,
Per ROB'T M. HUGHES,
His Counsel.

MARCH 14, 1904.

Service of this notice and the motion hereto attached accepted.

R. C. MARSHALL,
D. TUCKER BROOKE,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 159.

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

STATEMENT.

On August 1, 1902, the schooner "William Neely," alleged in the declaration (R., 13) to belong to residents and citizens of Maine, and engaged in the coastwise trade between Virginia and New England and then commanded by Abram P. Thompson, the plaintiff in error, was bound in from sea to Norfolk and was hailed by Joseph J. Darden, a licensed Virginia pilot, who tendered his services as such. They were declined. Thereupon Darden brought assumpsit against Thompson in the court of law and chancery of Norfolk city for $87.75, the amount fixed by the Virginia pilot statute.

Thompson demurred to the declaration, contending thereby that the Virginia statute was invalid on various constitutional grounds set out in the demurrer (R., 14).

The lower court, without considering the others, held the statute void as in conflict with section 4237, United States Revised Statutes, forbidding discrimination in pilotage rates between vessels sailing between the ports of one State and vessels sailing between the ports of different States (R., 2). Hence it sustained the demurrer and entered judgment for Thompson, the defendant (R., 15).

Under the Virginia practice a writ of error is not a matter of right. A party desiring it files a petition in the appellate court, which he may adopt as his opening brief, and to it he annexes a copy of the record. Hence, as Darden desired a review of the lower court decision, he filed a petition attempting to show error and to it attached a copy of the record up to and including the final judgment against him, and these papers constitute the first sixteen pages of the record in this court.

The Virginia court of appeals reversed the decision of the lower court, held the statute to be valid, and remanded the case, with directions to overrule the demurrer, permit the defendant to plead, and for further proceedings not inconsistent with the opinion (R., 18; 19 *et seq.*). This not being a final judgment, a trial was necessary. It resulted, as a matter of course, in a verdict for the plaintiff. Thereupon defendant, by motion in arrest, raised the same constitutional questions that had been raised by the demurrer (R., 24). He also raised the same question by offering an instruction and excepting to its refusal (R., 26). Judgment, however, was entered for the plaintiff for his pilotage fee (R., 25).

Under the Virginia practice a second appeal only takes up those parts of the record not already there under the first appeal (Va. Code, sec. 3463). Hence when Thompson desired to review this last judgment he, too, had to file a petition in the Virginia court of appeals and attach to it a transcript of the additional record. His petition is on page 17 of the record, and to it is attached a transcript of the new

record (R., 18–28). The opinion of the Virginia court of appeals is on page 19 of the record. (See also 101 Va., 635; 44 S. E., 755.)

This petition and transcript were filed in open court, but the court, being of opinion that the judgment was plainly right, refused a writ of error and supersedeas (R., 28–29).

This exhausted the defendant's opportunities of review and was a final judgment reviewable by this court. Accordingly the defendant filed a petition for a writ of error, with an assignment of errors, and the writ was allowed and bond approved by the president and presiding judge of the Virginia court of appeals (R., 30–33).

ASSIGNMENT OF ERRORS.

First. The supreme court of appeals of Virginia erred in reversing the judgment of the court of law and chancery of the city of Norfolk on the demurrer, and holding the Virginia pilot law not to be in conflict with the Constitution of the United States. The validity of said law was denied and drawn in question by the defendant in error on the ground of its being repugnant to the Constitution of the United States and in contravention thereof in the following particulars:

1. It is in conflict with section 9, article 1, of the United States Constitution, wherein it is provided that:

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of

different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article 4, section 2, paragraph 1, of the United States Constitution, wherein it is provided that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty, or property without due process of law.

5. It is in conflict with section 4236 of the United States Revised Statutes, which provides as follows:

"The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article 1, section 8, paragraph 3, of the United States Constitution, which provides that Congress shall regulate commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1, 1898, respecting licensed officers on sailing vessels of over 700 tons.

Second. The said court erred in refusing a writ of error and supersedeas to the court of law and chancery, which court refused to instruct the jury as prayed by this defendant in

bill of exceptions No. 1, and also refused to set aside the verdict and grant a new trial on the grounds set out in bill of exceptions No. 2; also overruled the defendant's motion in arrest of judgment.

All these different motions and requests of the defendant raised the question of the constitutionality of the Virginia pilot law on the same grounds as those just above set forth.

Of these it is proposed to discuss only the first, second, and fifth.

The Virginia pilot law is contained in sections 1955–1990 of the Code of 1887.

The important ones are sections 1965, 1966, 1967, 1969, and 1990, which are as follows:

"SEC. 1965. *What Vessels to Take Pilots, and Where.*—The master of every vessel (other than a coasting vessel having a pilot license), inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, and any such vessel outward bound, shall take the first pilot that offers his services at Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point, to sea; and any master, refusing to do so, shall immediately pay to the said pilot full pilotage from the sea to Newport News, Smith's Point, Yorktown, or Norfolk, or from said ports to sea, as the case may be; but no master of a vessel coming from sea shall be compelled to take a pilot after arriving within the line at which Cape Henry bears west of south: *Provided, however,* That any registered vessel arriving within the line of Cape Henry bearing west of south, without having taken a pilot, bound for Norfolk, Newport News, or Richmond, shall not be liable for pilotage; but the master may pilot his own vessel to Hampton Roads, and there employ any steamboat or towboat to tow his vessel to her port of destination: *Provided,* That in no instance shall any master be allowed to employ any steamboat or towboat below Hampton Roads without paying full pilotage to the first regular pilot that offers his services to said vessel; and any master so employing a steamboat or towboat below Hampton Roads without a pilot on

board of such vessel, when one shall have offered his services, shall be liable to the penalty prescribed in section nineteen hundred and sixty-three. This provision shall apply to inward bound vessels."

"SEC. 1966. *Where Employment of Pilots Not Required.*—No master shall be required to have a pilot to conduct his vessel or steamboat above Newport News, Yorktown, Mobjack bay, Urbanna, or Smith's Point, but he may, himself, or by any person regularly employed on board, pilot his own vessel, or he may employ the services of any towboat, to tow his vessel to her port of destination above any of the above-named points."

"SEC. 1967. *Issue of License to Coasting Vessel by Pilots' Agent at Norfolk and Richmond; Pay of Agents.*—Pilots shall appoint agents, one for Norfolk city and one for Richmond, who shall grant licenses to coasting vessels trading in all the rivers of this State; for which licenses such agents shall receive ten cents per ton for one year; and coasting vessels having such licenses shall be free to sail without pilots to or from sea; but all vessels sailing under a coasting license, of the burden of seventy tons or more, coming from or going to sea, without having obtained a license from such agent, shall be subject to the same regulations and pilotage as registered vessels belonging to citizens of the United States."

"SEC. 1969. *Rates of Pilotage.*—Pilots shall have pilotage at the following rates: For every vessel owned by a citizen of the United States, and for every vessel owned by any citizen or subject of any foreign State, whose vessels are by treaty placed on the same footing as vessels of the United States, if the vessel be spoken or boarded to the east of Cape Henry, there shall be paid for each foot the vessel draws, as follows: From sea to Smith's Point, West Point, Newport News, Norfolk, or any place between Smith's Point, West Point, Newport News or Norfolk, vessels drawing ten feet and under, two dollars and fifty cents; vessels drawing thirteen feet and over ten feet, three dollars; vessels drawing fourteen feet and over thirteen feet, three dollars and fifty cents; vessels drawing sixteen feet and over fourteen feet, four dollars; vessels drawing over sixteen feet, four dollars and fifty cents. If the vessel be boarded or spoken twenty miles or more eastward of Cape Henry, twenty-five cents per foot shall be added to the foregoing rates. There shall be paid the same pilotage from Smith's Point, West Point, Newport News, or

Norfolk, or any intermediate point to sea, as from sea to those places; and from Newport News to Jamestown, or any place between Newport News and Jamestown, one dollar and thirty-five cents per foot; from Newport News to Richmond, or any place between Jamestown and Richmond, two dollars and fifty cents per foot; and the same rates of pilotage shall be paid from said places, respectively, down. Vessels coming from sea to Hampton Roads and thence to any port in Maryland, shall be subject to the same rate of pilotage as vessels bound from Newport News to sea. All vessels coming to Hampton Roads, seeking, in ballast, shall only pay one-half pilotage in and one-half out: *Provided, however*, That if such vessel coming to Hampton Roads, seeking, is afterwards chartered to load in any port or place in this State, she shall pay the usual pilotage in and out as though she had come to a direct port. All steamers calling in any port or place in this State for the sole purpose of coaling, shall only pay one-half pilotage in and one-half pilotage out. All vessels that go from Norfolk to Newport News to load or to finish loading, and all vessels that go from Newport News to Norfolk to load or finish loading, shall, if they take a pilot (which shall be optional with the master), pay a fee of ten dollars to the pilot for transporting any such vessels to or from either place."

"SEC. 1990. *Vessels on Potomac Excepted from Pilotage.*—Nothing in this chapter shall be construed to apply to vessels bound for any point on the Potomac; and no vessel, bound to or from any point on the Potomac, shall be required to pay pilotage. But if she does take a pilot, she shall pay the regular rate of pilotage to Smith's Point."

An analysis of these statutes shows that all vessels (except coasting vessels with a pilot license) which are inward bound from sea must take a Virginia pilot as far as Smith's Point (the mouth of the Potomac), Yorktown, Newport News, or Norfolk, or any intermediate point. Also all vessels outward bound to sea must take a Virginia pilot as they pass these points, no matter where their voyage commences.

An analysis of sections 1966, 1967, 1969, and 1990 shows that the following are expressly exempted from taking pilots:

1st. All vessels from Newport News, Yorktown, Urbanna, or Smith's Point to any points above those points, respectively.

2d. Vessels holding a coasting license.

3d. Vessels bound to any point on the Potomac.

It also appears that the following vessels are exempt from pilotage, for the reason that such vessels would not be inward bound from sea, and the further reason that no pilotage rates are prescribed by the statute for such voyages:

1st. Vessels plying between Virginia ports.

2d. Vessels plying between Virginia and Maryland ports.

The following vessels, under the pilot law, have a reduced rate under sections 1969 and 1975:

1st. Vessels coming to Hampton Roads seeking (half pilotage).

2d. Vessels coming to any port of this State to coal (half pilotage).

3d. Vessels between Newport News and Norfolk, loading or finishing loading (optional whether to take any pilot or not, and a fee of only $10 if a pilot taken).

4th. Vessels from the naval anchorage to the navy yard (a special rate of $20).

Another remarkable provision of the Virginia pilot law is that even if an inward-bound vessel employs the services of a tugboat to bring her in, in which case she could not under any circumstances need a pilot, yet she must, under this statute, take a pilot aboard, although all the pilot would have to do would be to sit up on deck and watch the tug bring the vessel in (sec. 1965).

1. THIS STATUTE VIOLATES ARTICLE 1, SECTION 9, CLAUSE 6, OF THE FEDERAL CONSTITUTION, WHICH PROVIDES THAT NO PREFERENCE SHALL BE GIVEN BY ANY REGULATION OF COMMERCE OR REVENUE TO THE PORTS OF ONE STATE OVER THOSE OF ANOTHER.

It has been held that this clause of the Federal Constitution applies both to Federal and State legislation.

Passenger Cases, 7 How., 414.

And it applies to any legislation that works beneficially to the ports of one State over those of another.

"Preference can only be given the ports of a State by giving advantages to those engaged in doing business through such ports. It is not the port, but the commercial transactions carried on by or through its medium, that are to be given the benefit of such relations. Neither is it the individual port that is not to be preferred, but the State or its citizens through its ports. Nor do I understand that such preference must be confined to vessels entering or leaving such ports, clearing from or being bound to them, any more than being owned and being registered at them, to justify an application of this prohibition. All are protected from being placed in any less favorable position in any commercial transaction on account of the ports of any State through which their business is done than those whose relations are with a port of a different State. Vessels are recognized and known as belonging to certain ports according to the residence of the principal owner, and any preference shown them, or any unequal burden imposed upon them on account of the State in which they are owned, is certainly showing a preference for the ports of the more favored State, whether expressed in so many words or not—the effect is the same. Had the statute exempted all vessels arriving from or bound to Texas, and compelled payment from those arriving from or bound to Louisiana, can there be any question but what preference has been given to the ports of one State over those of another, although ports may not have been mentioned? And does not this hold equally as good if the difference is on account of the State where the vessel is owned? I con-

sider it does. I am satisfied that if Congress should declare all vessels owned within the State of New York might enter and leave any port without the payment of fees, pilotage, or of any other character, while others owned elsewhere should be compelled to such payment, then this clause could be justly interposed as prohibitory; and I consider that the same restriction rests upon the legislation of a State relating to foreign commerce as in the present question. A State cannot do indirectly what it is prohibited from doing directly."

The Lizzie Henderson, F. C. No. 17726a.

Under the terms of section 1965 of the Virginia statute every vessel inward bound from sea must take a Virginia pilot; and under section 1963 it is made a crime for any person not a Virginia pilot, or for a Virginia pilot after removing from the State, to conduct a vessel to or from sea, and it is even made a crime in the master of any vessel to employ any one but a Virginia pilot for that purpose.

The statute works a discrimination in favor of voyages between Virginia ports and Maryland ports. No pilot fee is imposed for such a voyage, and yet a pilotage fee is imposed for all vessels coming from sea to a Maryland port, which includes all vessels coming from other States. Therefore, under this law, a vessel plying between a Virginia port and a Maryland port is exempt from pilotage, unless it voluntarily chooses to employ a pilot, and a vessel coming from the port of any other State to a Maryland port is required to pay pilotage. It is submitted that this renders the statute invalid.

Guy vs. Baltimore, 100 U. S., 434.
Brewing Co. vs. McGillivray, 104 Fed., 258.
John M. Welsh, 2 Fed., 364.
Booth vs. Lloyd, 33 Fed., 593.

2. THE VIRGINIA PILOT LAW IS IN CONFLICT WITH SECTION 4237 OF THE UNITED STATES REVISED STATUTES.

This section provides:

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

Notwithstanding the construction wrung out of this statute in the petition for a supersedeas (R., 1–10), it is submitted that the meaning of the statute is really too plain for discussion. When it expressly says that there shall be no discrimination between vessels sailing between the ports of one State and vessels sailing between the ports of different States, there is no room for putting any construction upon it, except the construction that the statute means to prevent any discrimination between those two classes of vessels as classes.

There are many rules of construction laid down for the purpose of finding the meaning of statutes and legal documents, but there is one rule which overrides all others. That is, that when the language of the statute is perfectly plain the legislature is supposed to have meant what it said; and there is no room for rules of construction.

"We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is

nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction."

U. S. vs. Hartwell, 6 Wall., 385.

But we are not left to conjecture even in the application of so plain a rule of construction as this.

"Taking these objections in the order stated, the first relates to the restrictions contained in section 4237 of the Revised Statutes. This plainly divides vessels into two classes, vessels sailing between the ports of one State, and vessels sailing between the ports of different States; or, in other words, vessels bound from any port to another port in the same State; or those bound to some port in a State other than the one from which they sail, and declares that between these two classes of vessels there shall be no discrimination. It does not intend to prevent discrimination between individual vessels of either of these classes based upon size, draft of water, or other proper grounds, but evidently is to prohibit any State from so far giving preference to commerce carried on between its own ports as to establish a discrimination between two vessels based upon the fact that one vessel is engaged in a voyage to a port beyond its limits, and the other is not. That this was the intent of the law becomes more apparent when upon examining the pilotage laws in force at the time of the passage of this act, July, 1866, we find that certain States—Massachusetts, Georgia, and perhaps some others—had laws in force embodying this very discrimination in favor of vessels sailing between ports within their own States, and against vessels sailing between such ports and those of other States. The discrimination in the case under consideration is not based upon such state of facts, and I do not therefore consider it in conflict with its provisions."

The Lizzie Henderson, F. C. No. 17726*a*.

The fact is that this ground of objection to the statute is decisively settled by the case of *Spraigue vs. Thompson*, 118

U. S., 90, which classified the vessels just as the statute classifies them. In fact it goes even further. It holds that a similar statute was void not only because it exempted from the pilotage laws vessels plying between the ports of the State which made the laws, but also vessels plying between the ports of that State and the ports of two neighboring States. The question was raised under the construction of the pilotage law of the State of Georgia. That law exempted from its compulsory features coasters in the State, which can mean nothing else than vessels engaged in the coastwise trade from port to port in the State, also vessels sailing between the ports of Georgia and the ports of South Carolina, and also vessels sailing between the ports of Georgia and the ports of Florida. But because it required the payment of pilotage by vessels sailing between the ports of Georgia and the ports of all the other States in the Union except those three, the law was held to violate this provision of the Revised Statutes.

So, too, in the case of the *Undaunted*, 37 Fed., 662. A California statute exempted not only vessels sailing between the ports of California, but also vessels sailing between the ports of California and Oregon and the ports of California and Washington. The court held the law to be void.

It is not necessary to go far to ascertain the purpose of Congress in the enactment of this statute. The ground on which compulsory pilot laws have been sustained is that, unless they are made compulsory, there will not be a sufficient amount of business to encourage the organization and education of trained men for such a service. This line of thought runs through all the cases which discuss these laws. In other words, pilotage fees are a burden put upon commerce on the theory that, while it might work hardship on the individual, it results in general benefit to commerce treating it as a whole.

This argument applies as well to the internal trade of a State as to the external trade. There is much more need of

pilots for voyages along the narrow and crooked channels of the rivers than for voyages in from sea, and the Virginia statute prescribes pilotage rates for some such voyages (for example, Newport News to Richmond), but without the compulsory feature.

"The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality, and is made aware of the dangers of such locality, if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs, or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity—his skilled knowledge—very seriously in the course of a long voyage. He should make a few of the first 'trips,' as they are called, after his return, in company with other pilots more recently familiar with the river."

Atlee vs. Union Packet Co., 21 Wall., at page 396.

The present system of light-houses and buoys is so perfect, and coast survey charts so accurate that any person can direct even a large draft vessel into Hampton Roads and up the other waters of Virginia as far as the points to which the law requires them to take pilots. After they pass those points, then the real necessity begins; and yet the Virginia pilot law is so framed as to require vessels to take pilots only up to the points where their services really begin to be necessary. The extent and accessibility of Hampton Roads and the ports near it are the boast of tidewater Virginia. Therefore, if pilotage is still one of the infant industries and the state of commerce still such that a compulsory pilotoge system is necessary, it would seem clear that its burdens should not be made to fall solely upon outside commerce, but that domestic commerce also should bear its part.

An illustration may make this inequality clearer. From the capes of Virginia to Norfolk is about twenty-seven miles. The chart shows that the channel, certainly as far in as Hampton Roads, is straight and wide. From Hampton Roads to Norfolk it is comparatively straight, though narrower than the channel from Hampton Roads to sea. Under the Virginia pilot law a vessel bound to Norfolk must take a pilot. Under the terms of section 1965, even if the pilot fails to hail her at the required point and she gets within the capes, she still, while she may refuse a licensed pilot, cannot employ a tugboat or any other than a licensed pilot. On the other hand, a vessel bound from Richmond to Norfolk need not take a pilot. There is not an actual port of any commerce in Virginia from which a vessel bound to Norfolk is required to take a pilot. There is not a port of any commerce outside of Virginia, except Maryland, from which a vessel is not required to take a pilot. From Richmond to Norfolk is about one hundred and twenty miles, along a narrow and tortuous channel, where a pilot is very much more necessary than from the Virginia capes to Norfolk.

The ground on which the validity of the law is main

tained in the petition for a supersedeas and upheld by the Virginia court of appeals seems to be that under the language of section 4237 of the Revised Statutes a State pilotage law may make as many discriminations as it pleases between vessels bound on different voyages, provided only it makes no discrimination between vessels pursuing substantially the same voyage. To put this in more concrete form, they contend that because the Virginia pilot law only imposes compulsory pilotage on vessels bound to or from sea, which pilotage would apply to a vessel bound from a Virginia port in from sea as well as to a vessel bound from other States in from sea, therefore the pilot law is valid. The answer to this is manifold.

1. The terms of section 4237 apply as well to cases where pilotage is voluntary as to cases where it is compulsory. Under section 1963 of the Virginia pilot law it is provided as follows:

"If any person, not authorized by law, or any pilot, after removing from the State, undertake to conduct or pilot a vessel to or from sea, or to or from any port or place in Virginia, or if any master or person on board any steamboat or towboat tow a vessel to or from sea, or to or from any port or place in Virginia, except as authorized by this chapter, without having a pilot on board of such vessel (if one shall offer his service), he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, at the discretion of the jury, be imprisoned in jail not more than three months or fined not exceeding two hundred dollars. Any master employing any person not authorized by law, or any pilot who has removed from the State, to act as a pilot of his vessel, shall pay one hundred dollars to any regular branch pilot who shall sue for the same. Warrants for such offenders may be issued, upon the oath of any party complaining, by a justice of any county or mayor or justice of any city in this State, in which such offender may be at the time; and, upon proof of probable cause, the offender shall be bound, with surety in due form of law, to appear at the next term of the circuit court of said county or corporation

court of said city for trial of such misdemeanor; and the circuit court of said county or corporation court of said city shall have jurisdiction for the trial thereof."

Hence under this provision there is no alternative but to employ a licensed pilot or to take no pilot at all. The master must pilot his own vessel or take a licensed pilot, and this rule applies to all voyages, whether from sea or not. Hence, even where the pilotage is not ostensibly compulsory, only a narrow margin of election is allowed.

2. The language of section 4237 is not susceptible of the construction contended for. It expressly draws the line as to vessels sailing between the ports of one State and vessels sailing between the ports of different States. How, then, can it be contended that the only discrimination which it intended to forbid is discrimination between vessels engaged on practically the same voyage? How can a voyage between the ports of one State be the same as a voyage between ports of different States?

But the act will not bear even the test contended for by its advocates. Under it a vessel sailing from the Virginia capes to Norfolk must pay pilotage if hailed at the proper point. A vessel sailing from Cape Charles City to Norfolk need not pay pilotage, though she traverses practically the same waters. A vessel sailing from the capes of Virginia to Baltimore must take a pilot as far as Smith's Point. A vessel sailing from the capes of Virginia to Alexandria need not take a pilot, though she traverses exactly the same waters as the first and the long and difficult navigation of the Potomac in addition. A vessel from West Point to sea must take a pilot. A vessel from West Point to Norfolk or Cape Charles City need not take a pilot.

3. The contention that there is no discrimination between vessels inward bound from sea, because vessels sailing from Virginia ports inward bound would have to take a pilot just

as vessels sailing, for instance, from New England ports, is based on the assumption that there are Virginia ports on the seacoast. As a matter of fact there is but one (Chincoteague), and that an insignificant one with no commerce. A glance at the map will show that from Cape Henry to the North Carolina line is a long, straight stretch of seacoast, with absolutely no indentations, no port, and no possibility of ever having a port. So, too, from Cape Charles north to the Maryland line, the chart shows some indentations, but no ports, and no possibility of ever having any, for the peninsula forming the eastern shore of Virginia is narrow and its commerce is handled from the ports on the bay side, and always will be. These are facts of which this court takes judicial notice.

Brown vs. Piper, 91 U. S., 37.
Minnesota vs. Barber, 136 U. S., 313, 330.

Thus the question reduces itself simply to the issue whether a State can do indirectly what it is forbidden to do directly; whether it can word a statute in such a way as to apply ostensibly to waters where it has no ports as an excuse for making it apply to other States having ports. If Virginia had said directly that all vessels coming in from sea from other States should take a pilot, and no vessels coming from Virginia ports from sea should take a pilot, the draftsman of such an act would have been laughed at as ignorant of the geography of his own State, and the act would have been void on its face. Can the same result be accomplished by slightly varying the language? On the contrary, this court has decided more than once that the constitutionality of an act must be judged not by its intent, but by its effect.

"The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not re-

pugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court."

Minnesota vs. Barber, 136 U. S., 313.
Voight vs. Wright, 141 U. S., 62.

This question would seem to be set at rest by *Brimmer vs. Rebman*, 138 U. S., 78. There an act of Virginia reciting in its preamble the purpose of protecting its citizens from unwholesome meat provided that any meat slaughtered more than one hundred miles from the place where it was offered for sale should be subject to inspection by an inspector appointed for the purpose, and a fee was established for such inspection, which went to the inspector and not to the State. This made all meat brought from other States more than one hundred miles from the boundary line of Virginia subject to inspection, but it also made a great deal of meat slaughtered in Virginia itself subject to inspection. This court held that it would judge the act by its effect, not by the recitals of its preamble, and that it was void, as it subjected practically all meat from other States to inspection; and it was not saved by the fact that it subjected some meat slaughtered in Virginia. Hence, a statute which results in discrimination against the great mass of interstate voyages is not saved by inserting a clause making a small part of State voyages subject to the same fee.

4. Even on the assumption that there is such an actual or potential commerce from the Virginia coast line, the Virginia act would not be helped. In such case a vessel could sail from Chincoteague to Virginia Beach without taking a pilot, while a vessel from Maine to Norfolk would

be compelled to take a pilot. There is nothing in the language of section 4237 of the Revised Statutes which justifies the construction placed upon it by the pilots and by the Virginia court of appeals.

Much has been said and will be said of the hardship of requiring a State to conform to this statutory regulation, and on this alone practically the argument of the appellee is based.

But where the language of a statute is clear the *argumentum ab inconvenienti* has no application, and, besides, the State can easily avoid the effect of it by amending her law. Section 4237, U. S. Rev. Stats., only applies to interstate commerce, and hence her right to charge pilotage on foreign commerce is not affected. Even as to interstate commerce, the great governmental improvements of our waterways and the great growth of our commerce have rendered compulsory pilotage much less important than in 1851, when the case of *Cooley vs. Wardens*, 12 How., 299, was decided. At that time the right of the Government to spend money for such purposes was strenuously denied by one of the great political parties, and the commerce of the country was so small, comparatively, that compulsory pilotage was important, as it took a fee from every vessel to support a pilot organization. Since then the constitutionality of these appropriations is no longer questioned, and the growth of our commerce has been almost inconceivable. The reason of the policy which prevailed at the decision of that time prevails no longer. Even in that case the decision was rendered by a bare majority. Hence, if the effect of this act is to render necessary the abolition or modification of the compulsory system, at least so far as it affects interstate commerce, no great harm can be done. The State has an easy alternative. She can make pilotage compulsory both on inter-state and infra-state voyages, and give in both cases the right to take out annual licenses, as provided by section 1967 of her pilotage law. The result would be, that

vessels trading between Virginia ports would take out a license, and as they are, as a rule, small vessels, the burden would not be very great. If the State is indisposed to do this, then she ought not to object to abolishing the compulsory feature as against inter-state vessels as well as against infra-state vessels. The pilots would still have left their fees on foreign vessels and their fees from masters of interstate vessels who do not feel competent to pilot their own vessels. Thus the purposes of this statute would be accomplished, which are, to distribute the burden of the pilot system equitably upon both domestic and interstate commerce.

As a result of this attempt of the State to put the burden all on one class of trade, the pilotage rates have been made very heavy. Under section 1969, vessels drawing ten feet and under pay $2.50 per foot, while vessels drawing over sixteen feet pay $4.50 per foot. A peculiarity of this law is that the excessive charge is not put on simply for the excessive draft, but is put on for the entire draft. In other words a vessel drawing ten feet must pay a pilotage fee of $25.00, whereas a vessel drawing sixteen feet must pay a pilotage fee of $72.00. A large modern steamer coming in light would probably draw just about sixteen feet. This would make her inward pilotage $72.00. When she starts out loaded, she would probably draw twenty-five feet; in fact, some of them have gone out drawing as much as twenty-eight and twenty-nine feet. At the rate of twenty-five feet this would make her outward pilotage $112.50, or a total pilotage for the round trip of $184.50. The large new schooners that are now being built, when loaded with coal, nearly all draw twenty-seven or twenty-eight feet. It was the evident intent of Congress to prevent this heavy burden from being placed solely on outside commerce, and to make State commerce bear at least its share. As domestic vessels navigating the inland waters are necessarily of much lighter draft, there would be nothing inequitable in making them bear a small proportion.

It has been said above that the theory on which compulsory pilotage laws have been sustained is that it is necessary to make all vessels take pilots in order to keep up a pilotage organization, and that a pilotage organization is necessarily, in the language of the appellant's petition, a choice of the lesser evil as compared with frequent salvage (R., 5).

The Virginia pilot law, however, is counter even to this theory; for section 1967 permits vessels engaged in the coasting trade to take out an annual license and dispense with the employment of a pilot. There could be no more patent admission of the ease of navigating Virginia waters without a pilot; and the fact proves that, with the modern system of internal improvements, pilots are no longer necessary. If the master of a coasting schooner is competent to navigate his vessel in with a license, he is certainly competent to do it without a license.

3. THE PILOT LAW VIOLATES SECTION 4236 OF THE REVISED STATUTES.

This statute provides:

"The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

It may be a matter of some difficulty to say exactly what shape of water constitutes the boundary between two States, but, in view of the object with which this statute was enacted, it is submitted that Chesapeake bay is in that sense at least a boundary between Virginia and Maryland. The line, as will be remembered, at one point runs from Smith's Point across in rather an irregular line to the southern end of Tangier island, and then for some distance up Pocomoke sound and Pocomoke river, following practically the *filum*

fluminis of these two latter bodies of water, which are part of Chesapeake bay.

This question has come up more than once in connection with the pilot laws of Pennsylvania and Delaware, both of which are situated on Delaware river, but on the same side of the river, and the courts have held that in the sense of this act Delaware river is a boundary between Pennsylvania and Delaware.

Clymene, 9 Fed., 164; 12 Fed., 346.
Abercorn, 26 Fed., 877; 28 Fed., 384.
South Cambria, 27 Fed., 525.

Under the terms of this section of the Revised Statutes, an incoming vessel has the right to take the pilots of either of the two States which border on such waters to points situated on such waters. It is clear from the language of the statute that the point to which the master of a vessel has a choice of pilots need not itself be opposite that part of the waters which are the boundary. If it is on those waters, though at a point higher up, then the master of the incoming vessel has the right to choose his pilot. The Virginia law, however, expressly requires him to take a Virginia pilot alone, and deprives him of his right in such case given him by such statute of choosing a Maryland pilot. In this respect the Virginia law is unconstitutional.

The decision should be reversed.

ROBERT M. HUGHES,
For Plaintiff in Error.

NORFOLK, VA., *January* 3, 1905.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 159.

ABRAM P. THOMPSON, PLAINTIFF IN ERROR,

vs.

JOSEPH J. DARDEN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

I.

HOW THIS CASE ARISES.

The schooner "William Neely," of the State of Maine, while sailing "*inward bound from sea*" to the port of Norfolk, Virginia, was spoken at sea by Joseph J. Darden, a licensed pilot of Virginia, with "*Cape Henry bearing west of south*," and the pilot "*offered his services to Norfolk.*" The schooner did not have "a pilot license," nor was she a coastwise sea-going steam vessel entitled to be under the control and direction of a pilot licensed by the United States. Under the Virginia Code, with reference to compulsory pilotage, it was the duty of the master of the schooner to accept the services tendered; but he refused to do so, and became thereby bound

to "*immediately pay to the said pilot full pilotage*" (Code of Va., section 1965).

Compelled to sue to secure his rights, Darden, the pilot, brought an action of trespass on the case *in assumpsit* in the Court of Law and Chancery of the City of Norfolk against Thompson, the master of the schooner, for his fees, amounting to $87.75, and Thompson demurred to the declaration.

The demurrer contained seven particulars of assignment against the validity of the Virginia statute, and as they are the basis and groundwork of the attack against the pilot law of Virginia now being made in this court, we will quote them here at length.

1. It (the Virginia pilot law) is in conflict with section 9, article I, of the United States Constitution, wherein it is provided that:

> "No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another."

2. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

> "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

3. It is in conflict with article IV, section 2, paragraph 1, of the United States Constitution, wherein it is provided that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States.

5. It is in conflict with section 4236 of the United States Revised Statutes, which provides as follows:

> "The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

6. It is in conflict with article I, section 8, paragraph 3, of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage.

7. It is in conflict with the act of December 1 [21], 1898, respecting licensed officers on sailing vessels of over 700 tons.

The judge of the Court of Law and Chancery of the City of Norfolk gave judgment on the demurrer in favor of the defendant below (the plaintiff in error here). From that judgment Darden obtained a writ of error from the Supreme Court of Appeals of Virginia.

Upon a hearing in the Supreme Court of Appeals, that court unanimously reversed the Court of Law and Chancery of the City of Norfolk, overruled the demurrer, and remanded the case for further proceedings.

Record, p. 18.

When the case came on again to be heard in the Court of Law and Chancery of the City of Norfolk, the defendant therein

(the plaintiff in error here) offered no evidence and made no defense on the merits. He simply prayed an instruction directing a verdict in his favor, which the court refused. And upon a verdict of a jury in favor of the plaintiff for the sum mentioned in the declaration, the defendant moved the court to set aside the verdict and grant him a new trial. This motion the court overruled and entered judgment upon the verdict. The defendant thereupon tendered his bills of exception to the rulings of the court.

Record, pp. 24, 25, 26.

The defendant then presented his petition for a writ of error from the Supreme Court of Appeals to the Court of Law and Chancery of the City of Norfolk, but his petition was rejected and the writ of error refused.

Record, pp. 28–29.

This being a judgment of the highest court of law in the State in which a decision of the case could be had, and there being drawn in question the validity of a statute of the State on the ground of its being repugnant to the Constitution of the United States, and the decision of the said court being in favor of the validity of the statute, the defendant below filed his petition for writ of error to this court, attaching thereto an assignment of errors which are identical in effect with the particulars of assignment filed with his demurrer to the declaration in the Court of Law and Chancery of the City of Norfolk, and which have been set out at length.

Record, pp. 30–31.

The writ of error was ordered issued by the Supreme Court of Appeals of Virginia, and the case is now before this court in pursuance thereof.

Record, pp. 32–33.

II.

THE ALLEGED ERRORS WHICH ARE ABANDONED.

The plaintiff in error practically abandons in his brief (see page 5) his contention that the Virginia pilot law is invalid because of its alleged violation of the provisions of law enumerated in his assignment of errors under headings 3, 4, 6, and 7 (*ante*, p. 2). Indeed, he might well do so, for this court, in a case decided at the present term, concludes this case, so far as three of them are concerned.

See Olsen *vs.* Smith (not yet reported).

And the fourth is equally untenable.

(1.) *As to the third and fourth specifications of error:*

The plaintiff in error alleges as his third and fourth specifications of error:

> "3. It is conflict with article IV, section 2, paragraph 1, of the United States Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."
>
> * * * * * * *
>
> "4. It is in conflict with section 1 of the fourteenth amendment to the United States Constitution, which provides that no State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; and which forbids any State from depriving any person of life, liberty or property without due process of law."

These two specifications of error are effectively disposed of in *Olsen vs. Smith* (not yet reported). Mr. Justice White, delivering the opinion of the court, said:

> "It remains only to consider the contentions based upon the fourteenth amendment and the anti-trust

laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the fourteenth amendment, and that therefore all State regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the fourteenth amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred."

(2.) *As to the sixth specification of error:*

The plaintiff in error alleges as his sixth specification of error:

"6. It is in conflict with article I, section 8, paragraph 3, of the United States Constitution, which provides that Congress shall regulate the commerce among the several States and with foreign nations, and that no State shall lay any duty on tonnage."

This specification of error is also effectively disposed of by *Olsen vs. Smith*, Mr. Justice White on this point saying:

"The first contention in effect is that the State was without power to legislate concerning pilotage, because any enactment on that subject is necessarily a regulation of commerce within the provision of the Constitution of the United States. The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although State laws concerning pilotage are regulations of commerce, 'they fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject' (Cooley *vs.* The Board of Wardens, 12 How., 299; *Ex parte* McNeil, 13 Wall., 237; Wilson *vs.* McNamee, 102 U. S., 572)."

(3.) *As to the seventh specification of error:*

The plaintiff in error alleges as his seventh specification of error:

> "7. It is in conflict with the act of December 1 [21], 1898, respecting licensed officers on sailing vessels of over 700 tons."

The sections of the act of December 21, 1898, needful to be considered are as follows:

> "SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the *masters* and *chief mates* of sail vessels of over seven hundred tons and all other vessels and barges of over one hundred tons burden carrying passengers for hire. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer or pilot of any steamer or as master or chief mate of any sail vessel of over seven hundrod tons who is not license by the inspectors; and any one violating this section shall be liable to a penalty of one hundred dollars for each offense."
>
> * * * * * * *
>
> "SEC. 4439. Whenever any person applies to be licensed as *master* of a steam vessel, or of a sail vessel of over seven hundred tons, the inspectors shall make diligent inquiry as to his character, and shall carefully examine the applicant as well as the proofs which he presents in support of his claim, and if they are satisfied that his capacity, experience, habits of life, and character are such as warrant the belief that he can safely be intrusted with the *duties* and responsibilities *of the station for which he makes application*, they shall grant him a license authorizing him to *discharge such duties* on any such vessel for the term of five years."
>
> * * * * * * *
>
> "SEC. 4440. Whenever any person applies for authority to be employed as *chief mate* of ocean or

> coastwise steam vessels or of sail vessels of over seven hundred tons, or as second or third mate of ocean or coastwise steam vessels, who shall have charge of a watch, or for authority to be employed as mate of river steamers, the inspectors shall require satisfactory evidence of the knowledge, experience and skill of the applicant in lading cargo and in handling and stowage of freight, and if for license as chief mate on ocean or coastwise steamers, or of sail vessels of over seven hundred tons, or as second or third mate of ocean or coastwise steamers, who shall have charge of a watch, shall also examine him as to his knowledge and ability in navigation and managing such vessels and all *other duties pertaining to his station*, and if satisfied of his qualifications and good character they shall grant him a license *authorizing him to perform such duties* for the term of five years upon the waters upon which he is found qualified to act." * * *

An inspection of these sections will disclose the fact that they have no reference whatever to pilots of sailing vessels, or to pilotage at all. They simply provide for the examination and licensing of *masters* and *chief mates* on such vessels, and the licenses issued to such as are found competent only authorize such persons to perform the duties of the position for which they are licensed.

Thus it remains for us to discuss the subject only with reference to the three grounds relied on by the plaintiff in error and discussed in his brief filed in the case.

III.

ALLEGED ERRORS RELIED ON BY THE PLAINTIFF IN ERROR.

The record discloses that the plaintiff in error, in prosecuting his petition for writ of error, assigned two errors in the judgment of the supreme court of appeals of Virginia. Each of these alleged errors is based on the plaintiff in

error's contention that the Virginia pilot law is in contravention of the Constitution of the United States and of certain acts of Congress; and he enumerates four clauses of the Constitution and three acts of Congress which he alleges to be violated by the said law (*ante*, p. 2).

He states in his brief, however (page 5):

> "Of these it is proposed to discuss only the first, second and fifth."

The inference is evident that these points are the only ones upon which he intends to rely. They are as follows:

I. It (the Virginia pilot law) is in conflict with section 9, article I, of the United States Constitution, wherein it is provided that:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

II. It is in conflict with section 4237 of the United States Revised Statutes, which provides:

> "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

III. It is in conflict with section 4236 of the United States Revised Statutes, which provides as follows:

> "The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

IV.

THE FIRST ERROR RELIED ON: THAT ARTICLE I, SECTION 9, CLAUSE 6, OF THE FEDERAL CONSTITUTION IS VIOLATED.

The first alleged error which the plaintiff in error contends for, and argues in his brief, is that clause 6, section 9, article I, of the Constitution of the United States, providing that:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another"—

is violated by the Virginia law concerning pilotage; and on page 9 of his brief he asserts that this clause of the Constitution "applies both to Federal and State legislation; and he cites, to sustain the proposition, *Passenger Cases*, 7 How., 414 (1849).

An inspection of these cases will show that the real question involved therein was not section 9, but the commerce clause of section 8, of the Constitution. The cases were decided by a bare majority of the court, and the reporter naively states in the head-note:

> "Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States."
>
> Passenger cases, 7 How., 283.

Eight separate opinions were handed down in the cases and reference to the scope of the clause of section 9 in question is made in only two of them.

Justice Wayne, on page 414, said:

> "I *think* the court means to decide * * * that the sixth clause of the ninth section of the first article of the Constitution, * * * is a limitation upon

> the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another."

And Justice McLean, at page 406, speaking of section 9 of the Constitution, among others, said:

> "These provisions impose restrictions on the exercise of the commercial power, which is exclusively vested in Congress; and it is as binding on the States as any other exclusive power with which it is classed in the Constitution."

The only other case cited by the plaintiff in error to sustain his proposition is Williams *vs.* The Lizzie Henderson, Fed. Cas. No. 17726*a* (1880). That case, decided by Locke, District Judge, relied upon the authority of the Passenger Cases. It is true that he cites other cases in support of his conclusion, but an examination of them shows that their decisions have been misapprehended. Inman *vs.* Tinker, 94 U. S., 238, which Judge Locke quotes from, was a case dealing entirely with restrictions upon State legislation contained in section 10, article I, of the Constitution. And Mr. Justice Swayne, who delivered the opinion of the court, specifically stated that the decision was confined to the scope of clause 3 of section 10. And the very quotation which Judge Locke uses from Ward *vs.* Maryland, 12 Wall., 431 (another case relied on by him), shows that clause 6 of section 9 was there regarded, though not the point involved in the case, as a restriction upon Congress only.

So that the only authority advanced for the proposition is an old case, of doubtful authority, even if it had not been repudiated by subsequent decisions of this court, as it has been.

In Munn *vs.* Illinois, 94 U. S., p. 135 (1876), it was said:

> "The remaining objection, to wit, that the statute in its present form is repugnant to section 9, art. I, of the Constitution of the United States, because it gives a preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs."

And in Morgan *vs.* Louisiana, 118 U. S., p. 467 (1886), the court said:

> "The ninth section, including the above paragraph (6), is in like manner devoted to restraints upon the power of Congress and of the National Government; and the tenth section contains only restraints upon the powers of the States, by declaring what they shall not do. The most casual inspection shows this and the clause of the Constitution here relied on is not found among the restrictions of the States, but among those imposed upon the Federal Government."
>
> See also Johnson *vs.* Chicago, 119 U. S., p. 400.

Mr. Black, the author of an excellent work on constitutional law, says:

> "* * * The various clauses of the Federal Constitution which impose restrictions, limitations, or prohibitions upon the exercise of legislative power were designed, generally, to guard the rights of the people against oppression on the part of that Government which the Constitution created, not against their own States. They are therefore to be considered as applicable only to the Federal Government, except in those cases where the States are explicitly mentioned."
>
> Black's Constitutional Law (2d ed.), pp. 303–'4.

And Mr. Justice Miller, in his lectures on the Constitution of the United States, says:

> "Section 8 of the first article is devoted to the grant of powers to the legislative branch of the Government

> of the United States; section 9 is devoted to the restrictions upon *those powers*, and section 10 to express limitations upon the powers of the States."
>
> Miller on the Constitution of the U. S., p. 576.

Thus it would seem plain that the inhibition of clause 6, section 9, article I, of the Constitution has no reference to State legislation; and, since it is a State law that is under consideration in this case, that clause of the Constitution is in no way involved.

Nor can it be justly urged that the State law in question is, by act of Congress of 1789 (sec. 4235, Revised Statutes), adopted in such manner as to make it a *quasi* Federal law; and that, as such, the constitutional provision now being considered is applicable thereto, as it is to acts of Congress generally. That section provides as follows:

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots be, or with such laws as the States may respectively enact for the purpose."

The effect of this section was to leave the matter of pilotage to be dealt with by the several States within the limitations of their rights and powers as prescribed by such provisions of the Constitution of the United States as applied to them. As was said in Cooley *vs.* The Board of Wardens, above cited:

> "Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of this subject is such that until Congress should find it necessary to exert its powers it should be left to the legislation of the States; THAT

> IT IS LOCAL AND NOT NATIONAL; that it is likely to be best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

Whatever attack, therefore, may be made upon the constitutionality of the Virginia pilotage law, it must be based upon some other ground than that it is rendered void by the provisions of section 9, article I, of the Federal Constitution.

V.

THE SECOND SPECIFICATION OF ERROR.

The Federal and State Statutes.

The second specification of error argued in the brief of the plaintiff in error (pp. 3, 11–22), is that the Virginia pilot law is in conflict with section 4237 of the United States Revised Statutes.

Section 4237, U. S. Revised Statutes, is as follows:

> "No regulations or provisions shall be adopted by any State which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discrimination are annulled and abrogated."

This is the enactment under which it is alleged Darden's claim is void, for the reason that a discrimination against its terms is contained in the Virginia statute. Section 4237 (just quoted) concerns simply "*the rates of pilotage*," and prohits any discrimination "*in the rates of pilotage*"—

(1.) "Between vessels sailing between the ports of one State, and vessels sailing between the ports of different States."

(2.) Against vessels propelled in whole or in part by steam.

(3.) Against national vessels of the United States.

A discrimination of any one of these three descriptions is denounced by Congress; and if it could be found, and were applicable in this case, it would be confessedly fatal to Pilot Darden's claim.

But it cannot be found.

Obviously there is no discrimination in the Virginia statutes against vessels propelled in whole or in part by steam, or against national vessels, and the case is stripped, so far as the Federal statutes are concerned, of all questions save that stated under (1), above.

State and Federal Legislation as to Pilotage.

The earliest statutory enactment on the subject of pilotage in Virginia was adopted by the "Grand Assembly, held at James City, Va., March 32d, 1660–1," in the thirteenth year of Charles II—nearly two hundred and fifty years ago. That early act appointed one William Oewin as "cheife pilott" and compelled all vessels above a certain tonnage to accept his services as pilot, or, upon refusal, to pay him "*fourty* shillings."

See 2 Hening's Statutes at Large, 39.

And in May, 1755, the Colonial General Assembly of Virginia at Williamsburg passed an act entitled "An act for establishing pilots and regulating their fees."

In the preamble it was recited that:

> "Whereas, *it is necessary for the safety and preservation of ships and vessels coming into the bay of Chesa-*

> *peake*, bound up the rivers of this dominion, that able and experienced pilots should be, to conduct such vessels to their several moorings, and to prevent ignorant or unqualified persons from undertaking such pilotage, be it therefore enacted, etc."

And it was enacted (amongst other things) that:

> "All pilots shall keep a good lookout and that *every master of a merchant's vessel coming from sea shall be obliged to receive the pilot who first offers to conduct his vessel*, or shall pay him half pilotage; and then may continue the same, or choose another pilot, or proceed without a pilot if he sees fit" (6 Hening's Statutes at Large, pp. 490–491).

So that the very question now here might have arisen under the colonial act of 1755 if only it were in effect today; and since that day of 1755 when the colonial act was passed up to this day there has not been a single day when such a vessel as the "William Neely" could enter the Chesapeake bay from sea through the inlet or channel between Capes Charles and Henry without being compelled by law to pay a pilot's fees.

When the Constitution of the United States was adopted, with the power therein conferred upon Congress to "regulate commerce with foreign nations and among the several States" (art. I, sec. 8), jurisdiction was thereby conferred upon Congress to regulate pilotage in the navigable waters of the United States, for, as said by the Supreme Court of the United States:

> "Pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half pilotage, as it is called, is a necessary and usual part of every system of such provisions." *Ex parte McNeil*, 13 Wall., 238.

The First Federal Act of 1789.

Congress soon met its responsibility and exercised its power by enacting, as early as 1789, what is now section 4235 of the Revised Statutes of the United States, and which reads as follows:

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots be, OR WITH SUCH LAWS AS THE STATES MAY RESPECTIVELY ENACT FOR THE PURPOSE."

"The bays, inlets, rivers, harbors, and ports of the United States," these and all of them everywhere in the United States, are thus by act of Congress placed under the pilotage laws "*of the States respectively wherein such pilots be;*" and showing the forecast, as well as the then practical wisdom of that body, it added the words: "*or with such laws as the States may respectively enact for the purpose.*"

As said by Locke, J., in a district court of the United States:

> "leaving the entire matter to the local boards, as had been the case under three-fourths of all the previous legislation on the subject, was without doubt the quickest and most satisfactory manner of settling it" (Locke, D. J., in *The Chase*, 14 Fed., 854).

That "quickest and most satisfactory" manner of settlement by the local State boards remains today in vogue, and is in itself, and its long-lived usefulness, its own best eulogy.

The Composite Federal and State System of Pilotage.

Thus was created the composite system of pilotage that has existed in the United States for one hundred and fourteen years, and which, based upon the soundest principles of American democracy, represents alike the cherished sentiment of home rule, the practical wisdom that gave rise to it, and the benignant influence of the General Government in harmonizing local differences and conflicts.

Time and again has the Supreme Court of the United States approved this composite system as both constitutional and wise, and pointed out the necessity and expediency of pilotage laws being based on, and drawing their shape and plan from, the local conditions of separate jurisdictions and territories. In its view a diversity of plans must be provided for diverse conditions, and that diversity is not "discrimination" is a proposition too patent to need its sanction. But we defer citation of authorities until analysis has demonstrated the necessity of the doctrines which they respond to.

The Virginia Statutes.

The existing Virginia statutory law that bears on this case is contained in the Code of 1887, page 495 to page 501, inclusive. The pertinent sections are now cited, beginning with section 1965, which is entitled "*What vessels are to take pilots and where,*" which reads:

> "SEC. 1965. *What vessels are to take pilots and where.*—The master of every vessel (other than a coasting vessel having a pilot license), inward bound from sea, shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south, to Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point; and any such vessel, outward bound, shall take the first pilot that offers his services at Smith's Point, Yorktown, Newport News, or Norfolk,

or any intermediate point, to sea; and any master, refusing to do so, shall immediately pay to said pilot full pilotage from the sea to Newport News, Smith's Point, Yorktown, or Norfolk, or from said ports to sea, as the case may be; but no master of a vessel coming from sea shall be compelled to take a pilot after arriving within the line at which Cape Henry bears west of south: *Provided, however*, That any registered vessel arriving within the line of Cape Henry, bearing west of south, without having taken a pilot, bound for Norfolk, Newport News, or Richmond, shall not be liable for pilotage; but the master may pilot his own vessel to Hampton Roads, and there employ any steamboat or towboat to tow his vessel to her port of destination: *Provided*, That in no instance shall any master be allowed to employ any steamboat or towboat below Hampton Roads without paying full pilotage to the first regular pilot that offers his services to said vessel; and any master so employing a steamboat or towboat below Hampton Roads without a pilot on board of such vessel, when one shall have offered his services, shall be liable to the penalty prescribed in section nineteen hundred and sixty-three (1963). This provision shall apply only to inward-bound vessels." *

It is not the vessel sailing inward through the Virginia capes and "*bound to*" Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point *as its destination*, that is required to take a pilot and pay him, but it is "every vessel *inward bound* from sea" (other than a coasting vessel having a pilot's license), no matter what may be the port or point she is "*bound to*." She must take the pilot to disregard

* NOTE.—In the Virginia Code of 1873 it was provided, in chapter 91, section 12, page 772, that—

§ 12. The master of every vessel (other than a coasting vessel, *or a vessel four-fifths of which is owned by persons residing in Virginia*) inward bound from sea shall take the first Virginia pilot that offers his services, Cape Henry bearing west of south, &c.

In the acts of assembly of April 21, 1882 (see Acts of 1881-2, page 392), the italicised words "*or a vessel four-fifths of which is owned by persons residing in Virginia*" are omitted, and so they were likewise omitted in the Code of 1887.

"Smith's Point, Yorktown, Newport News, or Norfolk, or any intermediate point." Beyond these points up the Potomac from Smith's Point, up the York from Yorktown, up the James from Norfolk or Newport News, or up any river intermediate between the pilotage line of the capes and the designated points of pilotage, the taking of a pilot is optional with the master, if provided for at all, as hereafter noticed.

In connection with section 1965 there should be held in view section 1969 of the Code of Virginia, entitled—

"*Rates of Pilotage,*"

which section is as follows:

> "SEC. 1969. *Rates of pilotage.*—Pilots shall have pilotage at the following rates:
>
> "For every vessel owned by a citizen of the United States
>
> and for every vessel owned by a citizen or subject of any foreign State, whose vessels are by treaty placed on the same footing as vessels of the United States,
>
> if the vessel be spoken or boarded eastward of Cape Henry
>
> there shall be paid for each foot the vessel draws as follows:
>
> From sea to Smith's Point, West Point, Newport News or Norfolk,
>
> or any place between Smith's Point, West Point, Newport News or Norfolk,
>
> Vessels drawing ten feet and under, two dollars and fifty cents ($2.50);
>
> vessels drawing thirteen feet and over ten feet, three dollars ($3.00);

vessels drawing fourteen feet and over thirteen feet, three dollars and fifty cents each ($3.50);

vessels drawing sixteen feet and over fourteen feet, four dollars ($4.00);

vessels drawing over sixteen feet, four dollars and fifty cents ($4.50).

If the vessel be boarded or spoken twenty miles or more eastward of Cape Henry, twenty-five cents per foot shall be added to the foregoing rates.

There shall be paid the same pilotage from Smith's Point, West Point, Newport News, or Norfolk, or any intermediate point, to sea, as from sea to those places;

and from Newport News to Jamestown, or any place between Newport News and Jamestown, one dollar and thirty-five cents per foot ($1.35);

from Newport News to Richmond, or any place between Jamestown and Richmond, two dollars and fifty cents per foot ($2.50);

and the same rates of pilotage shall be paid from said places, respectively, down.

Vessels coming from sea to Hampton Roads and thence to any port in Maryland shall be subject to the same rate of pilotage as vessels bound from Newport News to sea.

All vessels coming to Hampton Roads, seeking, in ballast, shall only pay one-half pilotage in and one-half out:

Provided, however, That if such vessel coming to Hampton Roads, seeking, is afterwards chartered to load in any port or place in this State, she shall pay the usual pilotage in and out as though she had come to a direct port.

All steamers calling in any port or place in this State for the sole purpose of coaling shall only pay one-half pilotage in and one-half pilotage out.

All vessels that go from Norfolk to Newport News to load or finish loading, and all vessels that go from Newport News to Norfolk to load or finish loading, shall, if they take a pilot (which shall be optional with the master) pay a fee of ten dollars to the pilot for transporting any such vessel to or from either place."

For convenient reference we insert also the sections of the *Code 1963, 1966, 1978,* and *1990,* which directly bear on some parts of this discussion or shed light upon it.

"SEC. 1963. *Penalty for piloting, etc., vessel without authority, or employing unauthorized person as pilot; how offenders proceeded against.*—If any person not authorized by law, or any pilot, after removing from the State, undertake to conduct or pilot a vessel to or from sea; or to or from any port or place in Virginia; or, if any master or person on board any steamboat or towboat, tow a vessel to or from sea, or to or from any port or place in Virginia, except as authorized by this chapter, without having a pilot on board of such vessel (if one shall offer his services), he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, at the discretion of the jury, be imprisoned in jail not more than three months, or fined not exceeding two hundred dollars. Any master employing any person not authorized by law, or any pilot who has removed from the State, to act as pilot of his vessel, shall pay one hundred dollars to any regular branch pilot who shall sue for the same. Warrants for such offenders may be issued, upon the oath of any party complaining, by a justice of any county, or mayor or justice of any city, in this State, in which such offender may be at the time; and upon proof of probable cause, the offender shall be bound, with surety in due form of law, to appear at the next term of the circuit, county, or corporation court of said county or city, for trial of such misdemeanor; and the circuit, county, or corporation court of said county or city, shall have jurisdiction for the trial thereof."

* * * * * * *

"SEC. 1966. *Where employment of pilots not required.*—No master shall be required to have a pilot to conduct his vessel or steamboat above Newport News, Yorktown, Mobjack bay, Urbanna or Smith's Point, but he may, himself, or by any person regularly employed on board, pilot his own vessel, or he may employ the services of any towboat, to tow his vessel to her port of destination above any of the above-named points."

"SEC. 1967. *Issue of license to coasting vessel by pilots' agents at Norfolk and Richmond; pay of agents.*—Pilots shall appoint agents, one for Norfolk city and one for Richmond, who shall grant licenses to coasting vessels trading in all the rivers of this State; for which licenses such agents shall receive ten cents per ton for one year; and coasting vessels having such licenses shall be free to sail without pilots to or from sea; but all vessels sailing under a coasting license of the burden of seventy tons or more, coming from or going to sea, without having obtained a license from such agent, shall be subject to the same regulations and pilotage as registered vessels belonging to citizens of the United States."

* * * * * * *

"SEC. 1978. *Liability for pilotage.*—The master and the owner of every vessel shall each be liable to the pilot for his pilotage and other allowances, and also the consignee or supercargo of any vessel not owned by a citizen of the State; and if the said consignee or supercargo refuse to become responsible to the pilot for his fees, the master or owner of said vessel shall, before she leaves her port of departure, deposit with some responsible person, subject to the order of the pilot, the amount of the pilotage due him."

* * * * * * *

"SEC. 1990. *Vessels on Potomac excepted from pilotage.*—Nothing in this chapter shall be construed to apply to vessels bound for any point on the Potomac; and no vessel, bound to or from any point on the Potomac, shall be required to pay pilotage. But if she does take a pilot she shall pay the regular rate of pilotage to Smith's Point."

VI.

THE MAP OF VIRGINIA, AND ITS REFUTATION OF THE CHARGE OF DISCRIMINATION.

The map of Virginia disproves the assertion that there is any discrimination in the Virginia statutory law as to "*rates of pilotage*" in navigation, outward or inward bound, from or to the Chesapeake bay and the sea. Indeed, there is no discrimination of any kind as between "*vessels sailing between the ports of one State*" (Virginia), as one class, and "*vessels sailing between ports of different States*," as another class.

Looking first at the coast of Virginia, then at the channel, and then on the inland waters of Virginia which are reached by vessels inward bound, we discover that Virginia laws might comprehend:

1. *Seacoast pilotage*—that is, from port to port on the Virginia seacoast, or from a seacoast port of Virginia to the seacoast port of another State—is along the eastern boundaries of Accomac and Northampton counties, north of the Cape channel, and Princess Anne county, south thereof. No pilotage at all from port to port anywhere along this Virginia seacoast line of nearly one hundred miles, or from any port upon this coast to any other seacoast port anywhere, is required by Virginia, and consequently there can exist no discrimination for or against the ports of any State.

2. *Seacoast and sea pilotage*—that is, pilotage—

(1) *from the sea into a seaport of Virginia*, or

(2) *from a seacoast port of Virginia to a port over seas*,

is not required by Virginia, and hence no discrimination can exist in this respect.

3. *Seacoast and inward pilotage*—that is, pilotage—

(1) *from any port or point on the Virginia seacoast* (just as from any other exterior port),

(2) to any and all ports in Virginia inland waters through the Cape channel,

is required by Virginia *from any vessel "inward bound from sea" through the Cape channel to inland ports, no matter from what port it comes over seas, and no matter to what port it is bound inward.* The "SEA" or "OCEAN" means the great mass of waters that surround or encompass the land; and "THE HIGH SEAS" means the unenclosed waters of the ocean. They include the waters on the seacoast which are *without and seaward of low-water mark on the seacoast.*—Bouvier's Law Dictionary, High Seas and Sea.

Coastwise voyages are on the sea.

Coast Chart No. 131, sheet No. 1, of the United States Coast and Geodetic Survey, marks the delineations of the Chesapeake entrance, and shows that the line dividing the high seas from inland waters (including Chesapeake bay) runs from Cape Henry light to "outer entrance whistling buoy," and thence to Cape Charles light. So that every vessel entering Chesapeake bay is, until it crosses this line, on the high sea.

Thus it is clear:

(1.) That while coastwise pilotage from port to port,

(2) and pilotage from the coast outward over seas is not required by Virginia,

(3) Pilotage from any seacoast port IN VIRGINIA "inward bound from sea" is required, as from vessels from any other port, domestic or foreign; and also that—

(4) Pilotage from inland ports outward bound to sea is likewise required, and is simply the converse of pilotage from sea "inward bound."

These four species of pilotage—

(1) from seacoast port to seacoast port,

(2) from seacoast port outward bound to the port of some other State or nation,

(3) from sea inward bound through the capes,

(4) from within the capes outward bound,

are the only species of pilotage that pertain to the sea.

In the two species first mentioned there is no pilotage at all required, and in the two cases last mentioned there is no discrimination of any kind.

Illustrations.

1. Suppose a vessel at Chincoteague, on the Virginia seacoast of Accomac county, sails to Virginia beach, at the railway terminal in Princess Anne county. No pilotage is required.

2. Suppose a vessel sails from Delaware, New Jersey, New York, San Francisco, or Liverpool to Chincoteague or to Virginia beach. So of these no pilotage is required.

3. Suppose a number of vessels sail:

(1) One from Chincoteague, on the Virginia seacoast, inward bound to Norfolk, Virginia, within the Chesapeake bay.

(2) One from Virginia beach, on the Virginia seacoast, inward bound to Sewall's Point, Virginia, an intermediate point, en route to Norfolk.

(3) One from Assateague, Virginia seacoast, to Baltimore, Maryland.

(4) Suppose a number of other vessels from various American seaports of the Atlantic and Pacific coast, and from foreign countries, sail at the same time inward bound to ports within the Virginia capes—

in each and every case every one is (1) bound to pay pilotage to the Virginia pilot, and (2) at exactly the same rates.

So we may write Q. E. D. to the several propositions:

First. That all pilotage required by Virginia applies equally, impartially, and without discrimination to all vessels that come into Chesapeake bay from the sea, or go out of Chesapeake bay to the sea.

Second. That the inward-bound and outward-bound passages from and to the sea through the Virginia capes are the only passages that affect or pertain to the sea in which Virginia requires pilotage at all.

Third. That for the passage made by the schooner *William Neely*, of Maine, from sea to Norfolk, Virginia, no discrimination exists in Virginia law between the ports of Virginia or the ports of any one State as a class and the ports of different States as a class, and no discrimination as to "the rates of pilotage" is made.

Fourth. No exemption is made as to any port of any State or any nation with respect to pilotage through the channel between the capes.

Fifth. The *William Neely* is liable for and must pay the Virginia pilot's fees.

The fourth proposition is essentially the same as the third, though in a different form. It is put in the form of the third proposition because that follows the language of the Virginia Code.

It is put in the form of the fourth proposition because where a system of pilotage otherwise unobjectionable contains a specifically expressed exemption of vessels sailing from a particular State or port, it thereby indirectly creates a discrimination against vessels sailing from other States and other ports. When we come to consider inland pilotage we will again advert to this phase of the subject.

VII.

THE PILOTAGE SYSTEMS REQUIRE DIVERSITIES OF PLANS TO MEET LOCAL NECESSITIES, AND ARE LOCAL, NOT NATIONAL, IN THEIR NATURE.

The sovereign powers of government must of necessity, and in the nature of things, prescribe:

1. The class of vessels to be piloted,
2. The waters to be navigated with pilots,
3. The ports or points between which pilotage is to be provided,
4. The cases in which pilotage is compulsory under fitting penalties,
5. The cases in which pilotage is left optional with the master of the vessel, and
6. The charges or fees of pilotage which may be enforced,

and there are many other features of pilotage which come naturally, obviously, and justly under the regulation of the sovereignty having jurisdiction of the subject, such as the examination and appointment of pilots, and the various duties and obligations imposed on them and those dealing with them.

In respect to all of these matters Virginia has acted, prescribing *the class of vessels* to be piloted through the Cape channel, and making exceptions only of "coasting vessels having a pilot license." To this exception the United States by act of Congress has added others through its paramount power, and no violation of either the State or Federal exceptions appears.

No sort of discrimination is made in favor of or against any vessel, whether from a foreign port, an American port outside of Virginia, or a Virginia port. No exemption is made either directly or indirectly.

As to *the waters* to be piloted, Virginia, in her discretion, has not required coastwise pilotage on her seacoast, nor pilotage within her inland bays and rivers.

The ports and points between which the pilots are to conduct the vessels in their charge are pointed out either by specific designation or by inclusive description.

Vessels inward bound from sea are required to take pilots to "*intermediate points*" within Chesapeake bay, as well as to Smith's Point, at the extreme northern end of the bay on the Maryland line, where Virginia jurisdiction to compel pilots to be taken is ended; and "intermediate points" from the pilotage line between the capes to the Maryland line at Smith's Point embrace all Virginia ports or points on Chesapeake bay.

As to vessels bound to or from ports on the Potomac river no compulsory pilotage is provided for, because of the Federal statute which would, in effect, nullify any such provision. As to vessels of this class (bound to or from ports on the Potomac, which is a boundary between two States) Virginia has simply conformed her statute to the Federal statute, which is of superior force.

See Code of Va., section 1990.

Compulsory and Optional Pilotage.

As to optional pilotage.—The cases in which it is left optional are set forth in the Code as well as those in which it is compulsory; and it is proper to observe that—

(1) Compulsory pilotage only applies to passages through the capes between the sea and the bay ports,

(2) while optional pilotage applies in all other cases with which the pilot laws deal.

With these diverse plans has Virginia applied her sovereign discretion to meet "local necessities," and for so doing she has the double warrant of the act of Congress of 1789 and the judicial approval of the Supreme Court of the

United States declaring that act of Congress valid, and sustaining the State jurisdiction of the subject on all of her "*bays, inlets, rivers, harbors, and ports where her pilots be.*"

In *Cooley vs. Board of Wardens of the Port of Philadelphia*, 12 How., 299 (decided in 1851), that tribunal, in a clear and able opinion delivered by Judge Curtis, held valid the statute of Pennsylvania which required "every ship or vessel coming from or bound to any foreign port or place, or every ship of seventy-five tons or more sailing from or bound to any port NOT WITHIN THE RIVER DELAWARE," to receive a pilot, and imposing pilot fees for services rendered. By one section of the statute it EXEMPTED from both health and pilot charges "ALL VESSELS ENGAGED IN THE PENNSYLVANIA COAL TRADE."

Here was a statute applicable to vessels *coming from or going to sea*, to those of a certain tonnage only, and applicable also to ports "*not within the River Delaware*," exempting vessels in the Pennsylvania coal trade, which, notwithstanding its irregular and exceptional lines of operation, was held to be based on sound policy and to be within the purview of the Federal statute of 1789. That act of 1789 was held to contain a clear exposition of the Constitution by the first Congress to the effect that the power to regulate pilots was conferred on Congress by the Constitution, and in effect that the regulation of pilots was a regulation of commerce within the grant to Congress of that power contained in the third clause of the eighth section of article 1 of the Constitution. It further held that the States were not divested of the power to legislate on the subject by the grant of the commercial power to Congress (p. 318), and Judge Curtis said:

> "Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, LIKE THE SUBJECT NOW IN

QUESTION, AS IMPERATIVELY DEMANDING THAT DIVERSITY, WHICH ALONE CAN MEET THE LOCAL NECESSITIES OF NAVIGATION" (p. 319).

This learned judge further said that:

> "until Congress shall have found it necessary to exert its power it should be left to the legislatures of the States;"

that—

> "it is local and not national, and it is likely to be best provided for not by one system or plan of regulation, but by as many as the legislative discretion of the several States deem applicable to the local peculiarities of the ports within their limits."

Here, too, was a statute that did not apply to ports "within the River Delaware," showing that the Pennsylvania legislature differentiated inland pilotage from that which related to waters over which vessels coursed to sea, just as the Virginia legislature has done, and covering, indeed, all the principles that are pertinent to this case.

Many cases have co-ordinated with this leading one, and the questions settled by it are no longer debatable, whether as to the constitutionality of our composite system of pilotage, which intermingles Federal and State statutes, or as to the power of the States under it to differentiate the plans adopted to meet the local necessities arising as to particular "bays, inlets, rivers, harbors, and ports." *Ex parte* McNeil, 13 Wall., 236; *Steamship Co. vs. Joliffe*, 2 Wall., 450; *Spraigue vs. Thompson*, 118 U. S., 90; *Olsen vs. Smith*, U. S. Sup. Ct. (not yet reported).

VIII.

VIRGINIA'S OPTIONAL AND INLAND PILOTAGE SYSTEM FOR RIVERS AND BAYS.

There is no pilotage *required* by Virginia from Virginia port to Virginia port on the Chesapeake bay or other bay; neither is any *required* from port to port on any Virginia river.

But if the master of the vessel chooses to employ a pilot in certain cases the fees of pilotage are fixed by section 1969 of the Code, which is entitled "Rates of pilotage," and simply expresses what they shall be where a pilot is taken. What vessel *must* take pilots, and *where*, is a matter covered by section 1965. The rates prescribed are:

(1.) From Newport News to Jamestown or any place between Newport News and Jamestown, per foot, $1.35.

(2.) From Newport News to Richmond or any place between Jamestown and Richmond, per foot, $2.50.

(3.) The same rates per foot from such places respectively down, $2.50.

(4.) All vessels coming to Hampton Roads, seeking, in ballast shall only pay half pilotage in and out.

(5.) If such vessels coming to Hampton Roads seeking are afterwards chartered to load in any port or place in Virginia she must pay the usual pilotage in and out (*i. e.*, in from sea or out to sea), as though she had come to a direct port.

(6.) All steamers calling in any port or place of Virginia *for the sole purpose of coaling* shall pay half pilotage in and half pilotage out.

(7.) All vessels that go from Norfolk to Newport News to load or to finish loading shall, if they take a pilot (which shall be optional with the master), pay a fee of ten dollars to the pilot for transporting such vessel to or from either place.

No kind of discrimination as to this State or any other State can be discovered in these provisions. They are simply local charges for pilotage like local charges for freight or passenger traffic by common carriers; fixed by the legislature of Virginia according to the nature of the case: without complaint from any source; with congressional sanction and with judicial approval; without exemption or differentiation save as to coaling vessels, and with that differentiation sanctioned by the Supreme Court of the United States in *Cooley vs. Board of Wardens*, 12 Howard, 299, heretofore cited.

The Provision of Section 1969 as to Vessels Incoming to Hampton Roads and Bound Thence to Maryland.

One other item of section 1969 remains to be noticed. It is this:

> "Vessels coming from sea to Hampton Roads and thence to any port in Maryland shall be subject to the same RATES OF PILOTAGE as vessels bound from Newport News to sea."

Many considerations support this item.

1. It is only the Virginia "*rates of pilotage*" that the vessel lying in Hampton Roads and sailing to a Maryland port is subjected to. It is not subjected to any *compulsion* to take a pilot.

2. If the vessel were to go to Maryland from Hampton Roads or a Virginia seacoast point, such as Virginia Beach, or to Delaware, New Jersey, or to any other State, she would have to pay pilotage through the Cape channel—no matter what port or what State she started her voyage from. So, if she goes to Maryland from Hampton Roads after coming from sea, whether

(1) she started her voyage from Chincoteague, in Accomac county, Virginia, or Virginia Beach, in Princess Anne county, Virginia, or any other Virginia seacoast port;

(2) or started from any other State in the Union of the Atlantic or Pacific States;

(3) or started from any port anywhere the wide world over outward of the Virginia capes—

she would have to pay exactly the same pilotage to Hampton Roads and from Hampton Roads to a Maryland port.

3. *It is always to be held in mind that it is optional* for the vessel in this case to take the pilot or not, as it pleases; that "*must*" applies only to payment of fees if the pilot is taken; and that a vessel is in the Virginia waters at Hampton Roads "where the Virginia pilots be," and where Maryland pilots do not be.

This being the situation, and the vessel having determined that she does want a pilot to the Maryland port from Hampton Roads, how is she to get him?

She can only get him by voluntarily taking him.

And if she does voluntarily take him, why should she not pay him?

There is no allegation that the rates are unreasonable, nor any complaint of their amount. Their reasonableness is admitted. And how is it discrimination against a State to let the vessel going to its port lie free of charge in inland waters of another State, and there have a pilot ready to serve the vessel if she wants him and voluntarily takes him?

4. *Discrimination in the rates of pilotage* as between States cannot be predicated of such a provision. For what is "discrimination"? Let its definition answer. Worcester in the dictionary says it is:

> "The arbitrary imposition of unequal tariffs for substantially the same service."

A. T. Hadley says:

> "A difference in rates not based upon any corresponding difference in costs constitutes a case of discrimination."

No such discrimination appears here as between States, and there is no imposition of any kind.

5. These views are sustained by the tenor of the section that contains this item.

That section simply fixes rates, and it does fix them within all the waters of Virginia and between all the ports of Virginia in all cases which the General Assembly has thought proper and expedient to regulate in this particular.

And the sum of the matter is that Virginia in this item of her statute *has prescribed a reasonable rate to be paid by a vessel desiring and taking a pilot in Hampton Roads to a port in another State.*

If this item could be impugned we would answer:

First. That the whole pilotage code of Virginia would be legally perfect without it; and, if imperfect with it, can be made perfect by casting it out.

Second. That it is the *compulsory pilotage* system between the Virginia capes which this case brings up for adjudication; that no party is here having an interest to defend the inland and optional pilotage system, and that it is not involved in the pleadings or in any legal bearing of this case.

IX.

IF A DISCRIMINATING REGULATION BE ABROGATED, ALL OTHERS NOT DISCRIMINATING REMAIN IN OPERATION.

Authority is abundant and specific for the principle which we have stated, that if one item of the schedule of pilot's fees applicable to passage to a particular port is invalid it will be cast out, and the valid schedule will not thereby be cast out with it.

Modifications of the Virginia statutes occur by operation of Federal law every time Congress places an additional

limitation upon them, as in 1837, 1866, and 1871, but the portions of them untouched by the new limitations remain valid.

If the Virginia pilotage system were valid before this item was put into it, so will it be valid when this item is extracted from it.

A mere excrescence can be lopped off of a statute as readily as a barnacle can be scraped from the hull of a ship, and each, so far from being hurt, become all the better for the operation.

The Supreme Court of the United States over fifty years ago, in the leading case we have cited (*Cooley vs. Board of Wardens*, 12 Howard, 299), expounding the Pennsylvania pilotage statute and holding it valid, though the system applied to vessels coming into port from sea, was not applied to ports on the Delaware river. So, even if in this case the item that relates to the vessel passing from Hampton Roads to Maryland port carried down with it other items of inland pilotage from Virginia port to Virginia port or left a tract of inland waters without pilotage provisions, we would still have the compulsory system from sea inland and from inland to sea, in perfect and uninterrupted and undiscriminating integrity.

Illustrations of the Principle.

Other cases have happily defined and illustrated this doctrine, and the *Alameda*, 32 Federal R., 33 (1887), confirming the decision of the district court in 31 Fed. R., 366, is one of them.

In that case Judge Field, of the United States Supreme Court, holding the circuit court of the northern district of California, gave the opinion and held that the act of California in exempting that State, and also Washington, Oregon, and Alaska, from the operation of the pilotage system that covered vessels from all other ports that were in the coasting

trade and entering the California port, discriminated against the States that were not also exempted, but nevertheless that it left valid the untouched regulations of pilotage. Speaking of the Federal statute that inhibits the adoption by any State of regulations which make discriminations in the rates of pilotage between (1) vessels sailing between the ports of one State and (2) vessels sailing between the ports of different States, he said:

> "It abrogates all existing regulations thus discriminating. But it has no farther operation; it in no respect impinges upon any other regulations or touches the general system of pilotage or half pilotage, with respect to vessels engaged in foreign commerce.
>
> "The prohibited discrimination, if previously made, is abrogated; if subsequently made it is inoperative to defeat regulations otherwise valid" (p. 333).
>
> * * * * *
>
> "The case is essentially different from *Spraigue v. Thompson*, 118 U. S., 90. There it was sought to charge a coasting vessel which was excepted from pilot charges by the Code of Georgia; here it is sought to except from such charges a vessel engaged in foreign commerce, because of an exemption by the Code of California in favor of certain coasting vessels—an exemption contained in an independent section" (p. 334).

In *Olsen vs. Smith*, 68 S. W. Reporter, 320 (1902), the Texas court of civil appeals held that the Texas statute exempting from extra pilotage all vessels owned in Texas when arriving from or departing to any port in the State, and also the statute subjecting certain coastwise steam vessels to pilotage, were in conflict with section 4237 of the Revised Statutes of the United States prohibiting discrimination against States, and also in conflict with section 4444, Revised Statutes of the United States, providing that no State shall impose on pilots of steam-vessels any obligation to procure a State or other license in addition to that issued by the United States; but that court also observed and followed

the saving principles of Judge Field's decision above quoted, and applied it to preserve in force that portion of the Texas pilotage system that was not touched by the discriminating and invalid regulations. Consequently it held that the regulation not touched by the impugned discrimination, and that gave a pilot half-pilotage fees against a vessel *outside the bar* which refused his services, remained intact and valid.

The judgment rendered in this case was recently approved by the Supreme Court of the United States in the case of Olsen *vs.* Smith, not yet reported.

And in the case of *Williams vs. The Lizzie Henderson*, Fed. Cas. No. 17726*a*, it was said:

> "It is not for courts to decide what the law should be, but what it is; and the only question under consideration is whether the act of 1879 is valid or not. If not, it has not been claimed but what the pilot laws in force prior to the passage of that act were valid and binding, and, if it is invalid, they are still in force. And this I consider to be the case. The amendment of 1879 in no way changed the pilotage laws, as it, in effect, only attempted to establish a discrimination which I consider to be contrary to the Constitution, hence invalid, and the pilotage is due under pre-existing regulations * * *."

The legislature of Virginia intended the pilot systems devised by it, both the compulsory system that applies between the sea and the inland waters, and the optional system that applies within the inland waters alone, to be operated according to the details set forth in the statute. But if an inland detail be invalid, that is no reason to suppose that it did not intend all other inland details to remain, and the whole system as between the sea and inland ports, which is in no respect impugned, to remain also. And when all the unimpugned details do remain there is no kind of discrimination in them as to rates between States, and not a single State or port is put in an invidious relation.

Not only in pilotage enactments, but in all kinds of enactments, whether civil or criminal, the courts will preserve all sound and unobjectionable parts of statutes, and it is scarce conceivable that any court will tear down the sea and inland pilotage system and the sound parts of the inland system because of a single objectionable item.

We are willing to rest on this topic with the eminently wise and just declaration of Judge Field that the act of Congress applicable here "abrogates the discriminating regulation," but "has no farther operation," and upon the opinion of the court in Olsen *vs.* Smith. In that case Mr. Justice White said:

> "It is obvious from the provisions of the Revised Statutes, (sec. 4237,) forbidding discrimination in State legislation concerning pilotage, that Congress did not intend by that section to revoke the power of the States on the subject or to abrogate existing pilotage laws of the several States containing discriminatory provisions, but only to abrogate the provisions making the discrimination. This results since the statute, after first generally prohibiting regulations by any State discriminating 'in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States,' in careful language annuls and abrogates only 'all existing regulations or provisions making any such discriminations.'
>
> "And this construction of the section in question disposes also of the argument that if the statute be accepted as interpreted by the State court, it is nevertheless repugnant to the law of the United States, since, if the exceptions found in the State statute are eliminated, then those statutes impose pilotage charges upon all vessels, and hence subject coastwise steam vessels of the United States to such charges, although they are expressly exempted therefrom (Revised Statutes, 4444). But the provisions of

that section clearly contemplated that by existing State laws, coastwise steam-vessels of the United States were subject to pilotage charges, and proposed, whilst withdrawing such vessels from pilotage charges, not in other respects to interfere with the State laws on the subject of pilotage. This is plainly the result of the following provision contained in the section in question:

"'Nothing in this title shall be considered to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State.'"

X.

PILOTAGE LAWS SHOULD BE LIBERALLY CONSTRUED FOR THE PUBLIC SAFETY.

In *Smith vs. Swift*, 8 Metcalf, 332, the supreme court of Massachusetts has aptly said respecting pilot laws that "*they are not in derogation or contravention of common-law rights*," that "*they do not proceed from the common law*," but "*are to be classed under the head of the maritime law, which is not the particular law of England, but a part of the law of nations:*" and Hubbard, J., delivering its opinion, thus emphasized the policy of this liberal construction:

> "This subordinate but highly useful branch of the marine law, regulating pilots and pilotage, has long been enforced by positive statute provisions; and FROM THE VERY NATURE OF THE SUBJECT THESE PROVISIONS ARE ENTITLED TO A LIBERAL CONSTRUCTION IN ORDER TO GIVE FULL EFFICIENCY TO LAWS ESPECIALLY DESIGNED TO PROMOTE THE INTERESTS OF COMMERCE, AND TO PROTECT THE LIVES AND PROPERTY OF THE CITIZENS ENGAGED IN IT."

The seamen upon the vessels that encounter the perils of the sea and of other dangerous waters; the passengers upon

them, as well as the shippers and consignees of their costly cargoes of merchandise; the owners of the vessels themselves; the companies who insure the vessels and the lives and property upon them; the ports which are interested in their exits and entrances, are all deeply and intimately concerned that there shall be well-designed and well-administered systems of pilotage.

Such systems are as necessary for navigable waters as systems of police are necessary for great and crowded cities, and the public weal is as much concerned in the maintenance of pilotage on water as in the maintenance of police on land.

The establishing of pilotage systems is indeed a part of the police power of the States that existed solely in them before they adopted the Federal Constitution. Since then it exists in both the Federal and State governments, subject to the paramount power of Congress, as heretofore explained. When created, the system is a part of the police establishment of the State, provided for dangerous and difficult waters. It is in aid of the public safety; and the notion that the whole of it may be stricken down by a court because of some illegal item in its schedules that goes not to the foundation or integrity of the statute is scarce less than appalling.

Lord Esher has said of compulsory pilotage that—

> "It was not enacted for the protection *only* of ships; it was enacted for the protection of ports; of commercial ports, and also of naval ports; of commercial ports in particular, because if a vessel is wrecked and lost and sunk near to the entrance, or within the entrance of a commercial port, she is not only lost herself, but she is a great danger and obstruction to the port and to other vessels, and would interfere with the commercial business of the port."
>
> *The Charlton*, 8 Asp. M. C., 29.

When we consider the amount of money expended to diminish the dangers and improve the navigation of the

Virginia coast, the channel and the inland waters and ports, which are affected by the pilotage laws of Virginia and by the questions at issue, and when we contemplate how great are the dangers that yet remain to navigators, there is a practical warning to reinforce the injunctions of the courts in favor of liberal construction and in support of the system which Virginia has gradually developed. A just court would only yield to a judgment that crushed it because of imperious judicial obligation under clear law.

XI.

THE PLAINTIFF IN ERROR'S "ANALYSIS" OF THE VIRGINIA PILOT LAW.

We are confident that no discriminating provision as to the compulsory rates of pilotage can be found anywhere in the Virginia statute.

To show such discrimination the plaintiff in error contends that—

> (1) "There is not an actual port of any commerce in Virginia from which a vessel bound to Norfolk is compelled to take a pilot."
>
> Brief, p. 15.

On the next page (16) he admits that there is one port, Chincoteague, on the Virginia seacoast. But he immediately wipes it out by declaring it is an unimportant one, with no commerce.

The pilotage law was enacted with a view to ports that are and ports that may be. It is as to vessels voyaging between them that it applies, and, of course, if there is no port there can be no discrimination as to rates going to it or going from it, or with other ports in relation to it.

Ports come and ports go. Ruins mark many that have been; forests and swamps and deserts mark many that will

be. In twenty years from now many ports may exist on the Virginia seacoast and many ships may be coming to and going from Chincoteague. Virginia Beach, on the Virginia seacoast, south of Cape Henry, is now the terminal of a railroad from Norfolk. It may become a great port. And how many ports there are on the Virginia coast is not in any sense a material question to this controversy. This court could not construe decisions to be valid or invalid as cities rise or fall, or construe statutes according to the ever-changing movements of civilization.

(2.) Again the plaintiff in error contends that under the Virginia statute—

"A vessel sailing from the Virginia capes to Norfolk must pay pilotage if hailed at the proper point."

But that—

"A vessel sailing from Cape Charles City to Norfolk need not pay pilotage though she traverses practically the same waters."

Plaintiff in Error's Brief, p. 17.

This is illusive. The vessel sailing from the Virginia capes to Norfolk passes through the capes of Virginia from the sea to the inland waters and over the tract of water as to which compulsory pilotage applies in all cases. The vessel sailing from Cape Charles City to Norfolk does not traverse, really or practically, "the same waters," but *only inland waters;* and the difference between the sea or ocean and the inland waters is a difference which pilot laws generally recognize and which have always been recognized in Virginia and by the courts.

(3.) The plaintiff in error also contends that—

"A vessel sailing between the capes of Virginia and Baltimore must take a pilot as far as Smith's Point."

Whereas—

> "A vessel sailing between the capes of Virginia and Alexandria need not take a pilot though she traverses exactly the same waters as far as Smith's Point and the long and difficult navigation of the Potomac in addition."
>
> Plaintiff in Error's Brief, p. 17.

There is a plain answer to this argumentative statement, and it is found in the act of Congress of March 2, 1837, which is now section 4236 of the U. S. Revised Statutes. It provides that—

> "The master of any vessel coming into or going out of any port situate *upon the waters which are the boundary between two States* may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot the vessel to or from such port."

Section 1990 of the Code of Virginia, repealing compulsory pilotage as to the Potomac river, was therefore enacted in order to conform our law to the paramount law enacted by Congress in 1837.

If a Maryland pilot contests for employment with a Virginia pilot over this route, we may then consider a question which does not now arise and which has no relation to this suit.

(4.) Still again the contention is:

> "A vessel from West Point to sea must take a pilot,"

but—

> "A vessel from West Point to Norfolk or Cape Charles City need not take a pilot."
>
> Plaintiff in Error's Brief, p. 17.

This is mere truism. Of course a vessel from West Point to sea must take a pilot, because West Point is on York

river, on the inland waters of Virginia, and the sea is beyond the capes between which the tract of pilotage lies. Of course, also, a vessel from West Point to Norfolk or Cape Charles City is not compelled to take a pilot, because all three places—West Point, Norfolk, and Cape Charles City—are on the inland waters of Virginia, where compulsory pilotage is inapplicable. It is also true that a vessel from Alexandria, or Baltimore, or any other place on the inland waters, need not take a pilot to Norfolk or Cape Charles City, all of these places being within the inland waters.

There is not the slightest suggestion of discrimination that arises as between

(1) *vessels sailing between the ports of one State*, and

(2) *vessels sailing between the ports of different States*,

over the piloted tract of waters. The contention is brought down to the simple allegation that a State cannot require pilotage between the sea and inland ports; and such contention has been fully considered and answered by all the decisions of this court on this subject from the case of Cooley *vs.* The Board of Wardens, 12 How., 299 (1851), to Olsen *vs.* Smith, decided at this term. And this case is free from such exempting provisions as appeared in the first case mentioned, which was adjudicated over fifty years ago and has been uniformly followed. (See *ante*, p. —.)

It is stated on page 7 of the brief of the plaintiff in error that—

> "An analysis of these statutes shows that all vessels, (*except coasting vessels with a pilot license*), inward bound from sea must take a Virginia pilot as far as Smith's Point [mouth of Potomac], Yorktown, Newport News, Norfolk, or any intermediate point."

It is also stated that—

> "All vessels outward bound to sea must take a Virginia pilot as they pass these points, no matter where their voyage commences."

Both of these statements are but partially correct, for the vessel is not bound to take a Virginia pilot if coming into or going out of any port "*situate upon the waters which are the boundary between two States*," as already shown in the quotation of § 4236, Revised Statutes, and as appears also from § 1990 of the Virginia Code, already cited. Any argument founded on this mistaken statement of fact falls with its refutation.

Sections 1966, 1967, 1969, and 1990 of the Virginia Code.

We are further told that an analysis of sections 1966, 1967, 1969, and 1990, of the Virginia Code, shows that the following vessels are exempted from taking pilots:

> "1st. All vessels from Newport News, Yorktown, Urbanna or Smith's Point to any points above those points, respectively."

Answer. Vessels are only released from compulsory pilotage between the points named. They may employ a pilot if they see fit. Unquestionably a State may define the waters upon which pilotage is necessary; and this allegation has no legal consequence and involves no manner of discrimination as to rates or anything else, as it applies to all vessels without other distinction than that made by the Federal statute.

The provisions of the Pennsylvania law, that "every ship or vessel coming from or bound to any foreign port or place, or every ship of seventy-five tons or more, sailing from or bound *to any port not within the River Delaware*, shall be obliged to receive a pilot," and imposing pilot fees for services rendered, were based upon the same principle that is basic to the Virginia statute. The cases are similar except the James, York, Rappahannock, and Potomac rivers are involved in this case instead of the Delaware. And unless the plaintiff in error expects to overrule the decision in

Cooley *vs.* The Board of Wardens, 12 How., 299, by which the Pennsylvania statute was upheld, then there is no point in this statement.

"(2.) Vessels holding a coasting license."

Answer. The section referred to here is § 1967 of the Code of Virginia, and is as follows:

> "SEC. 1967. *Issue of license to coasting vessel by pilot's agent at Norfolk and Richmond; pay of agents.*—Pilots shall appoint agents, one for Norfolk city and one for Richmond, who shall grant licenses to coasting vessels trading in all the rivers of this State; for which licenses such agents shall receive ten cents per ton for one year; and coasting vessels having such licenses shall be free to sail without pilots to or from sea; but all vessels sailing under a coasting license, of the burden of seventy tons or more, coming from or going to sea, without having obtained a license from such agent, shall be subject to the same regulations and pilotage as registered vessels belonging to citizens of the United States."

This exemption is a perfectly proper one, unless Cooley *vs.* The Board of Wardens, 12 How., 299, and Olsen *vs.* Smith, recently decided, are to be overruled. The first of these cases upheld a statute which exempted all vessels "*engaged in the Pennsylvania coal trade*" from both "health and pilot charges." And this court held that the exemption was based on sound policy and was within the purview of the Federal statute of 1789.

And in Olsen *vs.* Smith, Mr. Justice White said:

> "Neither the exemption of coastwise steam vessels from pilotage resulting from the law of the United States; nor any lawful exemption of coastwise vessels created by State law, concerns vessels in the foreign trade; and therefore any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade."

Neither can it be said that the exemptions from the pilotage law of "licensed coasting vessels trading in all the rivers of this State" concerns vessels which are not so engaged. Besides, any vessel desiring to engage in "trading in all the rivers of this State" could easily get a license to do so, and there is no aspect in which an unlicensed vessel of Virginia, or any other State, or of a foreign nation, is discriminated for or against in the "rate of pilotage" or otherwise.

"(3.) *Vessels bound to any point on the Potomac.*"

Answer. Please see again § 4236 of the United States Revised Statutes and § 1990 of the Code of Virginia, which have already been quoted and cover this point.

Comment is made upon the fact that—

> "It also appears that the following vessels are exempt from pilotage, for the reason that such vessels would not be *inward bound from sea*, and the further reason that no pilotage rates are prescribed by the statutes for such voyages:
>
> "1st. Vessels plying between Virginia ports.
>
> "2d. Vessels plying between Virginia and Maryland ports.
>
> "The following vessels, under the pilot law have a reduced rate under sections 1969 and 1975:
>
> "1st. Vessels coming to Hampton Roads seeking (half pilotage).
>
> "2d. Vessels coming to any port of this State to coal (half pilotage).
>
> "3d. Vessels between Newport News and Norfolk, loading or finishing loading (optional whether to take any pilot or not and a fee of only $10 if a pilot is taken).
>
> "4th. Vessels from the naval anchorage to the navy yard (a special rate of $20)."

This is a mere summary, in part, of propositions already answered in detail, or of others to which no specific objection is made, and to which no valid objection can be made.

As there is no suggestion accompanying the comment that there is anything in these provisions which makes any discrimination in the rates of pilotage between—

a. Vessels sailing between the ports of one State

and

b. Vessels sailing between the ports of different States,

there is nothing for us to answer. We only call attention to these accumulations of ostensible points in the brief of the plaintiff in error, because their frequent recurrence carries an implication that they are regarded as serious. In fact, they are but mere citations of statutory facts which have no bearing on the issue.

XII.

SECTION 4236 OF THE REVISED STATUTES, AND PORTS SITUATE UPON WATERS WHICH ARE THE BOUNDARY BETWEEN TWO STATES.

As a last stand the plaintiff in error repeats his contention that the pilot law of Virginia violates § 4236 of the Revised Statutes. That section declares that—

> "The master of any vessel coming into or going out of any port situate upon the waters which are the boundary between two States may employ any pilot duly licensed or authorized by the laws of either of the States bounded on such waters to pilot the vessel to or from such port."

The allegation is strong. The specification of violation is *nil.* The evidence is *nil.* The proof in the case is *contra.* Compare with this statute of the United States the statute of Virginia, which is § 1965 of the Code, and which requires two classes of vessels (other than a coasting vessel having a pilot license) to take the service of a pilot. That is to say—

> (1.) A vessel, "*inward bound* from sea, shall take the first Virginia pilot that offers his services, Cape

Henry bearing west of south, to Smith's Point, Yorktown, Newport News or Norfolk, or any intermediate point."

(2.) "Any such vessel *outward bound*, shall take the first pilot that offers his services at Smith's Point, Yorktown, Newport News or Norfolk, or any intermediate point, to sea."

The comparison suggested reveals these facts:

I. That the field of compulsory pilotage is bounded by a line running—

(1.) From Cape Charles across the strait connecting the sea and Chesapeake bay to Cape Henry;

(2.) Thence from Cape Henry, the southern cape of Virginia, to Norfolk, at the mouth of the James river, a distance of about 27 miles;

(3.) Thence across the mouth of the James river to Newport News, a distance of about 12 miles;

(4.) Thence from Newport News to Yorktown, at the mouth of the York river, a distance of about 12 miles;

(5.) Thence from Yorktown to Smith's Point, at the mouth of the Potomac river, a distance, as the bird flies, of about 50 miles;

(6.) Thence to the beginning at Cape Charles, a distance of about 60 miles.

II. Vessels bound from sea inwardly to these waters must take a pilot.

III. Vessels outward bound from these waters must take a pilot.

IV. As to the waters of the James river above Newport News, the waters of the York river above Yorktown, and the waters of the Potomac river above Smith's Point, they are differently dealt with by both the United States and the Virginia statutes.

We have already pointed out how vessels voyaging to points on the Potomac are affected by reason of section 4236 of the Revised Statutes of the United States, above quoted, and section 1990 of the Virginia Code, conforming thereto. Points on the waters of the James and York rivers, which are not boundaries between two States, are under the operation of section 1966 of the Code of Virginia, which declares that—

> "No master shall be required to have a pilot to conduct his vessel above Newport News, Yorktown, Mobjack bay, Urbanna, or Smith's Point, but he may, himself, or by any person regularly employed on board, pilot his own vessel, or he may employ the services of any towboat, to tow his vessel to her port of destination above any of the above-named points."

And there is nothing in any case on this subject to indicate that such regulations are not perfectly correct from any standpoint; for, from the leading case on this subject [Cooley *vs.* The Board of Wardens, 12 How., 299, (1851),] to the latest case decided at this term (Olsen *vs.* Smith), this court has recognized the underlying policy of pilot laws—

> "as imperatively demanding that diversity which alone can meet the local necessities of navigation."

The application of the Virginia statute is a picture of this principle.

XIII.

THE CASE AT BAR DISTINGUISHED FROM CASES CITED UNDER § 4236.

Looking again at the map, we find that the northernmost point of a straight line that runs from Cape Charles to Cape Henry is about 60 miles from the southern boundary line of Maryland. Within that line is the whole field of pilot-

age. All of the land and all the waters are within Virginia, and at no point within this distance is there any boundary of water between Virginia and Maryland.

To put upon § 4236 of the U. S. Revised Statutes a construction which would apply to these waters and lands within Virginia would be to prolong and extenuate the statute beyond its natural purpose and to forget § 4235 of the Revised Statutes, which preserves the provision of 1789, that—

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively WHEREIN SUCH PILOTS BE, or with such laws as the States may respectively enact for the purpose."

If it be replied to this that § 4236 of the Revised Statutes has already been extended, by construction, in its operation to those waters which, while not in fact *separating boundaries* between two States, are connected therewith, we rejoin that the farthest range of judicial interpretation and the farthest range of legal contention has never carried such construction beyond the point of deciding that, IF THERE BE within the extended waters pilots of different States having a common water boundary, the master of the vessel coming into or going out of any port situate upon such waters may employ any one of those pilots, *provided he be* "duly licensed or authorized by the laws of either of the States bounded on such waters, to pilot his vessel to or from such port."

THE FACTS IN THIS CASE AS IT COMES BEFORE THIS COURT DO NOT BRING IT WITHIN THE TERMS OF § 4236 OF THE REVISED STATUTES.

This case is not predicated upon any such condition as would make it possible, under § 4236, for the vessel entering the capes of Virginia to have refused to accept the services of Darden, the Virginia pilot, when he offered them.

There is not even a hint in the record that such condition existed.

No pilot but Darden appeared in the waters near the capes of Virginia to hail the incoming vessel.

No duly licensed pilot of Maryland either appeared or offered his services, or was preferred, or appears to have been in those waters.

No question was ever raised as to a Maryland pilot being there, or as to the right of a Maryland pilot to be there, or as to the license or authority of any pilot but Darden.

The plaintiff in error has never at any time concerned himself about any Maryland pilot or about any pilot but Darden, nor has any Maryland pilot concerned himself about him.

The Plaintiff in Error Must Stand upon the Case He has Made.

The special demurrer to the declaration of Darden in the Court of Law and Chancery of the City of Norfolk, where this case originated, shows that, while it set forth in detail and under seven different headings its objections to the sufficiency thereof, it never even faintly suggested that it was any part of Darden's duty to allege that no other pilot but himself was there, or that no Maryland pilot was there, or that no duly authorized pilot of Maryland was there. In fact the demurrer recognized the correct legal principle that if there were matter of avoidance of an obligation

fixed by statute, and conformed to by the plaintiff in his declaration with strict compliance to statutory regulation, it was matter FOR HIM, THE DEFENDANT, TO SET UP AND PROVE.

It would be curious, indeed, and in defiance of the hoary and established principles of courts of law and equity alike, if the burden were thrown upon Darden to prove conditions with respect to the law of a foreign State, and with respect to strangers to that State, which might possibly be matter of colorable defense to his antagonist, which were of no concern to him, and which could raise no question for him to determine unless in fact a Maryland pilot, duly licensed and authorized, had presented himself to the incoming vessel, the *William Neely*, and entered into rivalry with him (Darden) for the employment to which he was entitled under the actual existing conditions.

THE PLAINTIFF IN ERROR ARGUES A MOOT CASE.

We are invited under this last contention of the plaintiff in error to cast out of court the case which he has made and to enter with him upon the moot question of a speculative case which he has, since his defeat, conjured up in his imagination. No doubt an ingenious lawyer might invent questions calling for consideration out of the Virginia and United States statutes which nowhere arise or are suggested in this record.

But it is not our task to consider such questions, and we respectfully suggest that it is not any part of the duty of this court to hear or to determine them. More errors have flowed from the tendency of judges, quite natural in itself, to make observations on conditions and questions not embraced within the record before them than from any other source.

CASES CITED BY THE PLAINTIFF IN ERROR WITH RESPECT TO § 4236 OF THE REVISED STATUTES.

And no case cited by the plaintiff in error that relates to § 4236 of the Revised Statutes, which we are now considering, has any application to the case stated, relied upon, and decided by the Supreme Court of Appeals of Virginia, and which this court is now reviewing.

The *Clymene*, 9 Fed., 164 (1881), was first decided by the U. S. District Court for the Eastern District of Pennsylvania, by Butler, District Judge.

In that case a Delaware pilot offered his services to the *Clymene* to conduct her to Philadelphia, her port of destination. His services were accepted and he did pilot the steamer to that city from the entrance to Delaware bay. He sued for his pilotage charges. The master of the steamer admitted the services, but pleaded that there was a Pennsylvania statute prohibiting any one from acting as such pilot without a Pennsylvania license. The Delaware pilot was sustained and the reasons therefor are summed up in the syllabus of the case of the *Clymene*, 12 Fed., 346 (1882), in which the Circuit Court for the Eastern District of Pennsylvania confirmed the judgment in favor of the Delaware pilot by the District Court.

The syllabus is as follows:

> "1. The act of Congress of March 2, 1837, authorizing the master of a vessel bound to or from a port situate on waters which are the boundary between two States to employ a pilot licensed by either State, applies to the pilotage laws of coterminous States situated upon a navigable river which is not a separating boundary between them.
>
> "2. A pilot licensed by the State of Delaware may recover for services in piloting a vessel up the Delaware bay and river to Philadelphia, notwithstanding a statute of Pennsylvania prohibits any one from acting as such pilot without a Pennsylvania license."

If in this case a Maryland pilot had appeared, if he had been duly licensed and authorized, if he had offered his services to the *William Neely* and had been accepted, then and then only could a case have arisen in which it would be necessary for the court to decide whether or not the conditions in this case were such as to bring such Maryland pilot within the provisions of the act of Congress of March 2, 1837, now § 4236, of the Revised Statutes.

In the *Abercorn*, 26 Fed., 877 (1886), in the U. S. District Court of Oregon, confirmed by the Circuit Court for the District of Oregon in 28 Fed., 384, the point decided is simply that:—

> "The Columbia river is a boundary between two States (Oregon and Washington) within the purpose and spirit of § 4236 of the Revised Statutes, and therefore the State of Oregon cannot require a vessel bound in or out of said river to take an Oregon pilot or pay him half, or any, pilotage IF THE MASTER THEREOF PREFERS AND DOES TAKE A WASHINGTON PILOT."

There is much virtue in IF. The Oregon pilot appeared; he was duly authorized; he offered his services to the master to pilot the *Abercorn* over the bar to the sea; the offer was refused; the vessel *accepted* a duly licensed pilot of the State of Washington who piloted the vessel and was duly paid by the master. The refused Oregon pilot claimed the right to recover under the Oregon law on account of the refusal to receive him. It is evident that no such case arises here, and the words "If the master prefers to and DOES TAKE a Washington pilot" contain the discriminating and determining point in the decision against the right of the Oregon claimant.

The case of the *South Cambria*, 27 Fed., 525, presents a conflict between a regularly licensed Delaware pilot and a similarly licensed Pennsylvania pilot. The Delaware pilot, who tendered his services first and was refused, claimed his fees. The master defended on the ground that he had the

right to select a pilot from either State bordering on Delaware bay and river, without reference to priority of offer by any such pilot. In this he was sustained, the ground of the decision being the right of the master to CHOOSE between rival pilots of equal right presenting themselves in due time for service. It is so stated in the opinion of Wales, J., page 528, where he points out that section 4236, the act of Congress in question, confers—

> "on the master of any vessel requiring a pilot the right of electing who shall serve him in that capacity."

He adds distinctively:

> "This was the object aimed at. The mischief to be suppressed was apparent and the remedy was equally so."

XIV.

CONCLUSION.

In conclusion, we respectfully submit to the court that no error has been shown in the decision of this case by the Supreme Court of Aypeals of Virginia, nor can any error be found therein.

In the opinion of that court, delivered by Buchanan, J., it is succinctly and clearly stated:

> "All vessels are subject to the same regulations and, under the same circumstances and conditions, are required to pay the same fees. There is clearly nothing in those statutes which expressly makes any discrimination between such vessels."

The identical questions were before that court that are now before this court, and we respectfully submit that a like conclusion should be reached.

R. C. MARSHALL, John W. Daniel
D. TUCKER BROOKE, Fred Harper
~~DANIEL & HARPER~~,
For Defendant in Error.

Supreme Court of the United States.

No. 159.—October Term, 1904.

Abram P. Thompson, Plaintiff in Error, *vs.* Joseph J. Darden. } In error to the Supreme Court of Appeals of the State of Virginia.

[May 15, 1905.]

Mr. Justice White delivered the opinion of the Court.

The law of the State of Virginia imposes compulsory pilotage on all vessels inward bound from sea through the Virginia capes, other than coasting vessels having a pilot's license, no matter to what port or point the vessel may be bound, and likewise imposes compulsory pilotage on all vessels outwardbound through the capes. The compulsory pilotage inward bound from the sea extends no further than to Newport News, Smith's Point, Yorktown or Norfolk, and the compulsory pilotage outwardbound through the capes commences at said points respectively. In the inland waters of Virginia above the points named compulsory pilotage does not prevail, but pilotage is regulated and rates therefor are provided, the duty being imposed, except where the statutes otherwise provide, of using only a licensed Virginia pilot if the services of a pilot are taken. (Virginia Code of 1887, sections 1963, 1965, 1966, 1978 and 1900.) Reference is made in the brief of counsel for the defendant in error to Virginia colonial legislation, (1775,) imposing compulsory pilotage on vessels inwardbound from sea through the capes, accompanied with the statement, which is unchallenged, that from that time to the present date there has been no period when compulsory pilotage regulations of a like nature have not prevailed in Virginia. The contentions of the plaintiff in error arising on this record assail the validity of the pilotage laws now in force. The controversy thus arose.

In August, 1902, the schooner William Neely, engaged in the coastwise trade between New England and Virginia, Abram P. Thompson, master, when bound in from sea to Norfolk, was offered by Joseph J. Darden, a licensed Virginia pilot, his services, which were declined. Thereupon Darden, the pilot, sued Thompson, the master, in the court of law and chancery of Norfolk, for his pilotage charge. Thompson demurred on the ground that the Virginia statutes as to pilotage were void because repugnant to the Constitution and laws of the United States, for various reasons, which were specified in the demurrer. The trial court sustained the demurrer. Darden, taking the record to the Court of Appeals of Virginia, ap-

plied for a writ of error, which was not a matter of right. The court allowed the writ, heard the cause, and, for reasons expressed in a full and careful opinion, reversed the judgment and remanded the cause for a new trial. (101 Va. 635.) At the new trial Thompson reiterated, by way of offers of evidence and other proceedings, the objections which had been expressed in the demurrer, and preserved his rights by exceptions taken to the action of the trial court which adjudged against him. He then carried the record to the Court of Appeals and applied for a writ of error, which was refused, and thereupon this writ was sued out.

In the argument at bar seven grounds of error are stated, and in referring to them generally many minute suggestions are made concerning the pilotage statutes, by way of indicating that discrimination arises from them. They mainly relate to the statutes regulating pilotage in the internal waters. Whilst we have given these suggestions our attention, we content ourselves with saying that we deem them to be devoid of merit. The more so because in the written argument the discussion is expressly limited to the first, second and fifth grounds of alleged error. These we proceed to consider.

1st. "This statute violates article 1, section 9, clause 6, of the Federal Constitution, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." In effect this proposition denies the power of Congress to permit the several States to adopt pilotage regulations, despite the recognition of that authority by Congress as early as 1789, (Rev. Stat. 4235,) and the repeated adjudications of this court recognizing and upholding the practice on the subject which has obtained from the beginning. (*Olsen* v. *Smith*, 195 U. S. 332, and authorities there cited.)

2d. "The Virginia pilot law is in conflict with section 4237 of the United States Revised Statutes." The section in question was quoted and commented on in *Olsen* v. *Smith*, *supra*, and avoids the provisions of all State regulations making "any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States." It cannot be said that the pilotage charge for vessels bound in and out through the capes is in and of itself discriminatory, since it imposes a like compulsory pilotage charge upon all vessels bound in and bound out. Speaking of the requirements of the statute, the Supreme Court of Appeals of Virginia said in its opinion in this case:

"By the provisions of the sections of the code quoted all vessels (except coastwise vessels with a pilot license) inward bound from the sea to Smith's Point, Yorktown, Newport News or Norfolk, or any intermediate point and all such vessels outward bound to the sea from Smith's Point, York-

town, Newport News or Norfolk, or any intermediate point, are subject to the compulsory regulations and rates therein provided. All vessels are subject to the same regulations and under the same circumstances and conditions are required to pay the same fees."

The arguments made to support the assertion that the pilot laws conflict with the act of Congress are twofold. First. As the State of Virginia has no appreciable commerce from her own ports inwardbound through the capes, therefore there is discrimination. Second. As Virginia has chosen by her legisation not to subject commerce on her internal waters to a compulsory charge for pilotage, therefore there is a discrimination in favor of commerce on the internal waters of Virginia and against commerce bound in and out through the capes from and to the sea. In other words, the proposition is that the State of Virginia was without power to make an undiscriminating regulation as to pilotage for ships bound in and out through the capes, unless a like regulation was made applicable to all the internal waters within the State. This is attempted to be sustained by contending that the navigation of the internal waters of Virginia is more tortuous than is the navigation in and out of the capes, and other suggestions of a kindred nature.

But the unsoundness of the proposition is made manifest from its mere statement. In effect, it but denies the power of Virginia to regulate pilotage, and presupposes that courts are vested with authority to avoid the pilotage regulations adopted by the States, which do not discriminate as to commerce to which they apply, simply because it is deemed they are unwise or unjust. As pointed out in *Olsen* v. *Smith*, an objection based on the assumed injustice of a pilotage regulation does not involve the power to make the regulation. Objections of this character, therefore, if they be meritorious, but concern the power of Congress to exercise the ultimate authority vested in it on the subject of pilotage.

3d. "The pilot law violates section 4236 of the Revised Statutes, which provides: 'The master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ any pilot duly licensed or authorized by the law of either of the States bounded on such waters to pilot the vessel to or from such port.'" It is said that whilst it may be difficult to say that the waters of the Chesapeake Bay between the capes constitute a boundary, still it is possible to so conclude. We observe concerning this contention that it does not appear to have been raised in the courts below. It is accompanied with no suggestion that the State of Maryland has ever attempted to regulate pilotage between the capes of Virginia, to which the Virginia statute relates, or that any Maryland pilot offered his services. The proposition, therefore, rests upon a series of mere conjectures, which we cannot be called upon to investigate or decide.

Judgment affirmed.